Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP AND THE BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

BARBARA ANISKO, ESQ.
Counsel of Record
KAPLIN STEWART MELOFF REITER & STEIN
350 Sentry Parkway
Bldg. 640, P.O. Box 3037
Blue Bell, PA 19422-2457
(610) 941-2457
Attorneys for Petitioner

Wright Appellate Services, LLC
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872
1107

QUESTIONS PRESENTED

I. Whether, in municipal liability cases arising from land use decisions made after lengthy deliberation, the "shocks the conscience" standard, as applied by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) to police officers in emergency pursuit cases, is the proper standard to apply to establish a municipal violation of substantive due process under the Fourteenth Amendment.

II. Whether a district court abuses its discretion in denying leave to amend a complaint on the basis of undue delay where there has been no finding of prejudice to the opposing party or the court or of bad faith on the part of the moving party.

PARTIES TO THE PROCEEDING

The Petitioner is, Cora F. Lindquist, individually and as Executrix of the Estate of James O. Lindquist.

The Respondents are Buckingham Township and the Board of Supervisors of Buckingham Township.

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OPINIONS BELOW

The opinion of the Third Circuit is not reported and is reprinted in Appendix D to the Petition. The Order of the Third Circuit denying rehearing is not reported and is reprinted in Appendix A to the Petition. The opinions of the District Court are not reported and are reprinted in Appendix H and I to the Petition.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Third Circuit affirming the dismissal by the District Court of claims made by petitioner arising under the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on July 19, 2004. Petitioner's request for a rehearing by the Third Circuit was denied by Order dated August 17, 2004. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES IN ISSUE

This case concerns petitioner's attempts to vindicate its rights to due process and equal protection under the United States Constitution. The Constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

> and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved in the case, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The federal rule of civil procedure involved in this case is Federal Rules of Civil Procedure 15(a), which provides:

> **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

A. Factual Background

This case is the result of James O. and Cora F. Lindquists' (the **"Lindquists"**) six year struggle to obtain development approval for their farm.

The Lindquists' farm is located in Buckingham Township (the **"Township"**) in the Commonwealth of Pennsylvania and consists of two adjoining parcels (the **"Property"**). The front parcel comprises 102 acres and is jointly owned by the Lindquists. The back parcel comprises 147 acres and is owned by James O. Lindquist and the Lindquists' three children.

The Property is located within the Township's AG-1 zoning district, which at the time of the Lindquists' original subdivision application, permitted the development of a cluster subdivision utilizing transferable development rights (**"TDR"**) as a by-right use. Commencing in 1994, the Lindquists sought to develop the Property as a cluster subdivision consisting of approximately 216 single family lots using TDRs.1

The Township offers a pre-submission sketch plan procedure for developers. The procedure allows a developer to submit a pre-submission sketch plan before filing a land development application with fully engineered plans so that he can receive direction from the Township's Board of Supervisors (the **"Board"**) whether the Township has any interest in the plan and whether the Township will require strict compliance with all ordinance requirements or will grant waivers from ordinance requirements.

The Lindquists took advantage of the pre-submission sketch plan procedure offered by the Township. Starting in February 1994, the Lindquists met with the Township informally to discuss development of the Property. During the meetings, the Township informed the Lindquists of its goals for any development plan for the Property: (i) to leave undisturbed approximately 60 acres of the front parcel to preserve an aesthetically pleasing vista; (ii) to confine the cluster

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1 In their late 60s and experiencing health problems, the Lindquists could no longer make a living farming the Property.

development to the center and back portions of the Property so that it would be screened from York Road, and; (iii) to utilize TDR's to preserve farmland.

In response to the Township's directive, the Lindquists prepared and submitted to the Township for review an initial sketch plan and after receiving comments a revised sketch plan incorporating the Township's goals for the Property. The sketch plans incorporated the Township's directives by: (i) preserving the vista; (ii) preserving approximately 100 acres from development; (iii) providing continued use of the front parcel as a farm; (iv) compressing the development to the center and back of the Property, and

(v) providing for the use of TDR's so that other farmland would be preserved.

The sketch plans were favorably received by the Board and the Planning Commission. The consensus of the Planning Commission was that the Proposed Development was "well thought out and should work well in the Township." Henry Rowan (**"Rowan'**), who was to shortly become a member of the Board stated that he was "pleased with the sketch as presented and it appears to be one of the more creative and innovative plans presented in a long time."

Compressing the proposed development to the center and back portions required certain waivers from the Township's Subdivision and Land Development Ordinances (**"SALDO"**). The Township's staff, the Planning Commission and the Board understood that waivers from SALDO would be required in order to develop the Property in conformity with the sketch plans.

Based on the sketch plans and ongoing discussions with Township officials, the Lindquist prepared a set of

preliminary plans providing for development of the property in two phases. Phase I was to consist of 111 single family lots located on the back of the front parcel and Phase II was to consist of 110 single family lots located on the back parcel. On March 29, 1996, the Lindquists submitted an application for preliminary subdivision approval for Phase I (**"Original Phase I Plan"**). The layout depicted on the Original Phase I Plan was consistent with the previously submitted sketch plans.

The Original Phase I Plan was reviewed by Lynn Froehlich-Bush (**"Froehlich"**), the Township' Planning Consultant, for compliance with the Township's Zoning Ordinance, and Ernest Knight (**"Knight"**), the Township's Consultant Engineer, for compliance with SALDO. The reviews did not identify any zoning deficiencies. Froehlich, however, commented that "[m]any aspects of the site layout are advantageous to the Township."

On May 1, 1996, the Planning Commission reviewed the Original Phase I Application wherein the participants discussed, *inter alia*, each of Knight's comments, particularly items which would require waivers from SALDO. There was no opposition by Ernest Knight or the Planning Commission to the waivers. Moreover, a number of the waivers that the Lindquists were requesting were common and routinely granted by the Board.

In mid-May 1996, a dramatic shift occurred in the Township's attitude towards the Lindquists and their development plan for the Property. Knight became "personally offended" when the Lindquists' attorney challenged in a letter his professional assessment of stormwater run-off criteria as they related to portions of the Property that were not being

developed. Thereafter, exhibiting personal animosity to the Lindquists and their attorney, the Township engaged in a four year campaign to delay and undermine the Lindquists' development plans.

During an August 28, 1996 meeting purportedly scheduled to approve the Lindquists' waiver requests,

Rowan condemned the Lindquists, their land planner, engineers and attorney for having submitted a subdivision plan to the Township which did not comply with each and every SALDO provision. Rowan's conduct was arbitrary and capricious in that it ignored that: (i) he had previously commented that the plan appeared "to be one of the more creative and innovative plans presented in a long time"; (ii) the layout depicted on the Original Phase I Plan was consistent with the layouts depicted on the sketch plans which were reviewed and consented to by the Board and Planning Commission; (iii) virtually all of the requested waivers were needed to "compress" the development and preserve the front portion of the Property from development as demanded by the Township; and (iv) the Planning Commission and Township Staff had recommended the requested waivers. Instead of approving the requested waivers, the Board directed the Lindquists to meet with Township Staff to work out the waiver issues.

Pursuant to the Board's direction, the Lindquists met on several occasion with Township staff in September 1996 and reached a compromise. Inexplicably, the Board rejected the recommendations of its professional staff.

Stymied by the Board's abrupt change in attitude, the Lindquists confronted the Board at an October 23, 1996 meeting. The Lindquists presented to the Board a "By-

Right" alternate plan for the development (**"By-Right Plan"**) which demonstrated that the Lindquists could develop the Property in full compliance with SALDO by extending the development into the front parcel. Because the zoning regulations permitted the subdivision of the property into cluster subdivision as a "by-right" use, the Board would have had to approve the By-Right Plan if submitted. The Board did not want the By-Right Plan and directed the Lindquists to proceed with Original Phase I Plan. The Board agreed to grant the waivers required and to process the plan under the August 24, 1994 zoning ordinance, as amended December 13, 1995. The Board, nonetheless, imposed a further condition, however, that the Lindquists to participate in a regional wastewater system yet to be designed (the **"Regional Sewage System"**) even though the Original Phase I Plan was designed around the stand-alone system that the Township had until then required.

The Lindquists could not proceed with their development plans until the design of Regional Sewage System was completed and at which time the Lindquists could prepare and file a revised plan accommodating the new system. Thus, the Lindquists had no option but to offer the Board a series of extensions of time postponing any action by the Board on the Original Phase I Application until such time as the design of the Regional Sewage System was completed and a revised plan could be submitted.

In the meantime, in February 1997, the Board amended SALDO to eliminate cul-de-sac streets. If the amendment were to be applied to the Lindquists' development plan, the plan as proposed would be prohibited.

By June 1997, the design of the regional sewage disposal system was sufficiently completed so that the Lindquists were able to prepare revised development plans. By letter dated June 10, 1997, the Lindquists' attorney advised the Board: (i) that the design of the regional sewage disposal system had now been sufficiently determined to allow the Lindquists to prepare a revised plan; (ii) that the Lindquists intended to submit a Revised Phase I Plan by the end of June 1997, and; (iii) that the Lindquists agreed to an extension of the statutory review period on the Original Phase I Plan to August 30, 1997.

On June 11, 1997, the Lindquists also filed an application for preliminary subdivision approval for Phase II (**"Phase II Plan"**). Also, on June 11, 1997, the Board enacted an additional amendment to the zoning ordinance which eliminated cluster subdivisions as a "by-right" use in AG-1 zoning districts and provided for cluster subdivisions only as a conditional use.

The Township again embarked on a course of conduct intended to thwart development of the Lindquists' Property. The Board scheduled the Phase II Plan to be reviewed by the Planning Commission within two weeks of its submission and before any professional reviews were provided in clear violation of SALDO provisions

Having received notice of the Lindquists' imminent filing of a revised plan, the Township placed the Original Phase I Plan on the Board's agenda for June 24, 1997. The Lindquists responded requesting postponement of the plans consideration. because: (i) their attorney was not available on such short notice to attend the meeting; (ii) the Revised Phase I Plans would be submitted within the next two weeks;

(iii) delay in submitting the revised plans was the result of Lindquists having to wait for the Township to complete its design the Regional Sewage System; (iv) the Lindquists agreed to extend the statutory review period for the Phase I and Phase II applications. Notwithstanding, after inducing the Lindquists to forgo their By-Right Plan, on June 25, 1997, the Board enacted Resolution 1533, denying the Lindquists Original Phase I Subdivision Application and the Original Phase II Subdivision Application.

The Board's refusal to grant the Lindquists an extension of the review period was in bad faith, given the Board's own admission that, under the Pennsylvania Municipalities Code (**"MPC"**), "a developer has the right to extend the review period and normally if a developer asks for an extension, they're granted an extension." By enacting Resolution 1533, the Board intentionally divested the Lindquists of their right to develop a single family detached cluster subdivision as a "by-right" use and to develop the Property in accordance with Zoning Ordinances and SALDO in effect prior to the Board's enactment of amendments.

After the Board denied the subdivision applications, on September 3, 1997, the Lindquists commenced legal proceedings against the Township in the Buck's County Court of Common Pleas. The legal proceedings commenced by the Lindquists were resolved on November 12, 1997 by a Stipulation of Settlement signed by the parties and entered as an Order of Court on December 12, 1997 (collectively referred to as the **"December 12, 1997 Order"**).2 The December 12,

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2 During the negotiation of the Stipulation of Settlement, the Lindquists provided the Township with a copy of the Revised Phase I Plan that had been prepared and which the Lindquists

1997 Order provided the Lindquists, *inter alia*, with (i) the right to submit Revised Phase I Plans to the Board which would be governed by the ordinances in effect on December 13, 1995; (ii) the right to submit further revised plans (**"Further Revised Plans"**) to address comments raised by the Board's consultants' in their reviews of the revised plans for Phase I and Phase II, and; (iii) that any Further Revised Plans filed for Phase I would also be governed by the ordinances in effect on December 13, 1995.

On or about November 18, 1997, the Lindquists formally filed with the Township the Revised Phase I Application, which included a revised subdivision plan for Phase I of the Property (the **"Revised Phase I Plan"** or the **"Revised Plan"**).

The Township realized that so long as the Lindquists were cooperating with the Planning Commission and Township consultants to revise and improve the original plans, the Court Order required the Board to consider the plans under the 1995 ordinances and this would eventually lead to an approval. Therefore, the Board adopted a strategy to work around the December 12, 1997 Court Order almost immediately after the Order was signed. In January of 1998, the Township's consultants issued review letters for the Revised Phase I Plan. Although the normal practice in the Township after a plan has been reviewed by consultants is for subsequent "revised" submissions to be reviewed incrementally, *i.e.* to check the revised plans against the earlier comments to see if the comments were addressed in the revised plan, the

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intended to file so that the Township had the opportunity to see the plan before executing the Stipulation of Settlement.

Township's consultants, at the direction of the Board and contrary to the December 12, 1997 Order, processed the Revised Phase I Plan as a "new" plan. The Planning Commission also treated the Revised Phase I Plan as a "new" plan.

By treating the Revised Phase I Plan as a "new" plan, the Township improperly and in violation of the December 12, 1997 Order, sought to avoid all prior agreements and understandings.

After receiving the Township's consultants' review letters, the Lindquists felt that they had been sandbagged. Many of the additional comments in the Township's consultants' review letters were minor and non-substantive making it apparent that the purpose was to throw "everything at us and seeing what stuck to the wall."

Although many of the comments contained in the review letters were able to be resolved, certain issues could not be resolved without input from the Board. By letter dated April 16, 1998, the Lindquists informed the Board of their need for direction from the Board on a number of issues before they could proceed with the revisions to the plan. Finally, at a May 13, 1998 meeting, the Board gave the Lindquists cursory direction on three unresolved issues. However, those instructions directly contradicted prior agreements reached with the Township at the October 23, 1996 meeting. At the May 13, 1998 Board meeting, the Board agreed to an extension of the review period for the Revised Phase I Plan until July 30, 1998 purportedly so the Lindquists could submit Further Revised Plans.

On July 20, 1998, the Lindquists informed the Township that the Further Revised Plans would be submitted by the end of July. The Lindquists also offered an additional

extension of time to the Board to allow the Board time to review the revised plans.

Although the Board accepted each of the Lindquists' previous offers extending the review period, in a repeat of its earlier actions, the Board, without notifying the Lindquists, rejected the proffered extension. The Board's refusal to accept the extension was contrary to the MPC (which permits developers to extend the review period) and its own standard practice (which is to grant extensions if asked by a developer).

On July 22, 1998, the Board adopted Resolution No. 1598 denying the Lindquists' Revised Phase I Plan even though it knew that a Further Revised Plan was going to be filed by the end of the month. The Township admitted that it rejected the Revised Phase I Plan because it "knew that the Lindquists were getting closer to compliance with Township ordinances and wanted to reject the Revised Phase I Subdivision Plan before the Lindquists submitted any further revised plans." However, in their haste to deny the Revised Phase I Subdivision Plan before the Lindquists could submit Further Revised Plans, the Board denied the wrong plan, *i.e.* the Original Phase I Plan.

Despite the Board's action, the Lindquists filed the Further Revised Plan on July 31, 1998 Township officials took the Further Revised Phase I Subdivision Plan into their possession but stated that they would not formally accept them and would treat them as "new" plans.

Realizing that Resolution 1598 denied the wrong plan, on August 12, 1998, the Township quickly adopted Resolution 1599, which "re-adopted and confirmed" Resolution 1598 and retroactively sought to supplement Resolution

1598 to include the rejection of the Revised Phase I Plan. Resolution 1600 rejected all plans filed through July 22, 1998, accepted the Further Revised Phase I Plan filed on July 31, 1998 and set August 31, 1998 as the deadline for its review. Resolution 1599 did not list any reasons for denial of the Revised Phase I Plan but rather incorporated the reasons listed in Resolution 1598. The Board did not deny the Revised Phase I Plan on the merits since the Board members admitted that they enacted Resolution 1598 without bothering to read it, and without making any effort to determine whether the deficiencies listed in Resolution 1598, as incorporated by Resolution 1599, applied to the Revised Phase I Plan. The deficiencies identified in Resolution 1598, however, did not apply to the Revised Phase I Subdivision Plan because those deficiencies which were copied from Resolution 1533 and had been addressed in the Revised Phase I Plan.

The Board admitted that at the time that it enacted Resolution 1599 it already intended to deny the further revised plans filed on July 31, 1998. As of August 12, 1998, the Lindquists had not received any review letters for the Further Revised Plan nor had they received any notice that the Further Revised Plan had been placed on the meeting Agenda for the Planning Commission.

In a memorandum dated August 21, 1998, the Township Solicitor advised the Board that: (i) the Township's SALDO requires review of plans by the Planning Commission; (ii) the Board's rejection without a review by the Planning Commission would violate the Township's own ordinances; (iii) the December 12, 1997 Court Order permitted the filing of revised plans; (iv) the Further Revised Plans

filed on July 31, 1998 should be considered "revised" plans; (v) the December 12, 1997 Court Order did not set a limit on the number of revised plans that could be submitted; (vi) the Township should conduct appropriate reviews of the Further Revised Plan and provide information to the Lindquists; and (vii) the Further Revised Plans should be governed by ordinances as they existed on December 13, 1995. Disregarding its own solicitor's advice, the Board, did not have the Planning Commission review the Further Revised Plans and instead placed the Further Revised Plans on the Board's August 26, 1998 agenda, and requested expedited reviews from its consultants. The Township's consultants did not complete their reviews of the Further Revised Plan until the evening of August 28, 1998. On August 26, 1998, the Board enacted Resolution 1600 and denied the Further Revised Plans. For the first time in Township history, the Board denied plans on the same day that it received its consultants' review letters. In any event, as further underscoring of the Board's bad faith and arbitrary approach, the first 57 reasons stated for denial in Resolution 1600 were the same reasons listed in Resolution 1533, which the Lindquists had already addressed in the intervening 14 months.

The following day, the Board informed the Lindquists that the Further Revised Phase I Plan would be treated as a "new" submission requiring payment of new fees and subject to review under the Zoning Ordinance and SALDO as existed on that date. As a new submission, the plans would not comply because SALDO no longer permitted cul-de-sacs and zoning regulations now required conditional approval of cluster subdivisions. The Board admitted that it enacted the Resolution 1600 to ensure that all

contingencies were covered, *i.e.* that the Further Revised Plans were denied as a revised plan and as a "new" plan.

B. State Court Decision

The Lindquists commenced two lawsuits against the Township in the Court of Common Pleas of Bucks County (**"State Court"**): (i) a mandamus action against the Board seeking a "deemed approval" under 53 Pa.C.S.A. §10508 (the **"State Court Action"**); and (ii) a land use appeal of Resolutions 1598, 1599 and 1600. In the State Court Action, the Township sought to present evidence that, *inter alia*: (i) none of the Lindquists' development plans complied with the Township's Zoning Ordinance or SALDO; (ii) the Revised Phase I Plans contained "serious zoning violations"; (iii) the Revised Phase I Plans contained a "great number of subdivision violations"; and (iv) the reasons set forth in the First Denial Resolution still applied to the Revised Phase I Plan.

After all the evidence was presented, the State Court rendered a decision (**"State Court Decision"**) which contained 203 specific findings of fact and ordered that the

Revised Phase I Plan was "deemed approved" for the Township's failure to comply with 53 Pa.C.S.A. §10508. In the State Court Decision, the State Court made over 89 separate findings of fact dismissing each of the Township's claims of purported SALDO violations, strongly criticized the Township's improper review of the Lindquists' development plans, and ordered the Board to act in good faith in proceeding with the review and adjudication of all matters relating to the proposed development.

The Board filed an appeal with the Commonwealth Court of Pennsylvania (**"Appeal"**) which was withdrawn

after the parties reached a settlement as to the State Court Action only.

C. The Federal Action

The Lindquists commenced this federal civil rights action on March 10, 2000, 3 after the Township continued to impede development of their land, notwithstanding the State Court Decision.

On May 24, 2000, the Lindquists filed an Amended Complaint against, *inter alia*, the Township and Board (collectively referred to as the **"Township"**) 4 alleging that the Township's conduct in reviewing, processing and adjudicating their land development applications violated their substantive due process rights as protected by 42 U.S. § 1983 and the Fourteenth Amendment of the United States Constitution. On December 13, 2000, the Township filed an Amended Answer, Affirmative Defenses and Crossclaim after the District Court dismissed the Township's Rule 12(b) motions. Thereafter, the parties proceeded with discovery pursuant to scheduling orders entered by the District Court.

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3 James O. Lindquist died on January 7, 2002. Cora O. Lindquist, in her capacity as Executrix for his Estate was substituted as Plaintiff.

4 The Lindquists' Amended Complaint also asserted claims against Bush, , Knight, Froehlich, and each of the members of the Board of Supervisors, individually and in their official capacity. Thereafter, by agreement of the parties, the individual Board members and Froehlich were dismissed as parties. In or about September, 2002, shortly before trial, Plaintiffs settled its claims against Knight and Bush.

On June 14, 2001, at the request of counsel for Knight, the District Court stayed all proceedings in the case and placed the case in civil suspense. While the stay was in effect, the Township produced documents to co-defendants but did not produce them to the Lindquists.5 On August 7, 2001, the Court issued an Order transferring the action out of civil suspense and on the same date entered a scheduling order establishing a schedule for the filing of summary judgment motions and trial. The order did not allow any additional time for discovery or discovery motions.

On September 26, 2001, the parties filed cross motions for summary judgment, and in October, 2001, the parties filed their respective answers to the summary judgment motions. The Lindquists in their motion requested that the District Court, *inter alia*, grant preclusive effect to each of the 203 findings of fact made by the State Court. By Order dated November 20, 2001, the District Court granted preclusive effect only to the following two findings:

> a. The Board of Supervisors failed to take timely action on the Lindquists' Revised Phase I Subdivision Plan submitted November 18, 1997 because it denied the wrong plan in Resolution No. 1598 on July 22, 1998.

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5 The Lindquists served written discovery requests seeking, *inter alia*, minutes of all of the meetings of the Board during the relevant time period. While the Township produced all the meeting minutes to co-defendants during the stay of proceedings, it never informed the Lindquists of the document production and only provided copies of selective meeting minutes to the Lindquists' in response to their discovery requests.

b. The Lindquists' Revised Phase I Subdivision Plan was "deemed approved" upon the failure of the Township to comply with § 508 of the Municipalities Planning Code, Pa. Stat. Ann. Titl 53, § 10508, on or before July 31, 1998.

The District Court then denied the Lindquists' and each defendants' motion for summary judgment because of the existence of genuine issues of material fact.

On December 13, 2001, Bush appealed the District Court's Order. As a result, by Order dated December 14, 2001, the District Court removed the case from the trial list pending resolution of Bush's appeal.

After the case was reactivated in August, the Lindquists sought to obtain the complete minutes from Township's counsel with no success. Since the records were public documents, the Lindquists visited the Township building and requested to see the meeting minutes. The Township refused to make the requested records available for review upon learning that the request was being made on behalf of the Lindquists. The Lindquists also made a formal request to the Township Solicitor for the documents pursuant to the Pennsylvania Right to Know Act. The Township Solicitor, while acknowledging the Lindquists' right to review the documents, delayed in making the documents available. In December 2001, the Lindquists sent a different person to the Township building without disclosing his relationship to the Lindquists. He was given access to full and complete copies of Board meeting minutes and other records. Based upon that review, the Lindquists learned that another similarly situated development, located just around the corner from the

Lindquists' Property, was treated differently by the Township.

As a result of the newly discovered evidence, on December 21, 2001, the Lindquists filed a motion seeking leave to amend their Amended Complaint to add an equal protection claim against the Township only. The equal protection claim was based on the Township's different treatment of the Lindquists from other similarly situated developers.

The District Court took no action on the Motion to amend for six months. On May 31, 2002, after Bush's appeal was dismissed by the Third Circuit, the District Court issued an Order transferring the case out of civil suspense and listed the case for trial in September. Thereafter, on June 13, 2002, the District Court issued an Order denying the motion to amend on the sole ground of "undue delay."

Convening on September 17, 2002 and concluding on September 24, 2002, the case was tried before the District Court without a jury.6 During trial, the Lindquists reproved each of the findings of fact made by the State Court and presented further evidence of the Townships arbitrary and capricious misconduct. Thereafter, pursuant to the request of the District Court, the Lindquists and the Township

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6 During the course of the trial, the Lindquists sought to introduce evidence of the Township's different treatment of another similarly situated development as evidence of the Township's improper motive and arbitrariness in its denial of the Lindquists' development plans. The District Court excluded such evidence on the grounds, *inter alia*, that there was no equal protection claim, and introduction of such evidence would extend the length of the trial.

submitted Proposed Findings of Fact, Proposed Conclusions of Law and supporting Memoranda of Law.

However, after the trial, on January 14, 2003, the Third Circuit issued its decision in *United Artists Theatre Circuit, Inc. v.* Township *of Warrington, PA*, 316 F.3d 392 (3d Cir. 2003) wherein it extended the "shocks the conscience" standard articulated by this Court in *County of Sacramento v. Lewis* to substantive due process cases arising from municipal land use decisions. In so holding, the Third Circuit departed from its prior decisions which required a plaintiff to prove that municipal conduct was motivated by bias, bad faith or improper motive in order to establish a substantive due process violation under the Fourteenth Amendment.

On April 15, 2003, the District Court issued its Findings of Fact and Conclusions of Law ("District Court Opinion"). At page 16, the District Court stated:

> After the trial, our Court of Appeals issued a decision that heightened the bar for plaintiffs challenging municipal land use decisions on substantive due process grounds. *See United Artist Theatre Circuit, Inc. v. Township of Warrington, PA*, 316 F.3d 392, 401 (3d Cir. 2003), *reh'g en banc denied*, ---F.3d---, No. 01-3533, 2003 U.S. App. LEXIS 5936 (3d Cir. Feb. 25, 2003). In order to prevail on a substantive due process claim, plaintiffs must now demonstrate that a defendant's conduct in depriving them of a protected property interest was of such nature as to "shock the conscience." *County of Sacramento v. Lewis*,

> 523 U.S. 833, 846-48 (1998); *United Artists*, 316 F.3d at 401. This approach is a departure from prior precedent, which simply required plaintiffs to prove that a defendant acted with an improper motive. *See Woodwind Estates, LTD v. Gretkowski*, 205 F.3d 118, 124 (3d Cir. 2000); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1987). App. 54-55.

Applying this new heightened standard to this case, the District Court concluded:

> "In addition, the defendants may have been negligent at times and in 1998 may have acted with an improper motive toward the Lindquists and their representatives. However, there is nothing in the facts we have found to prove that the defendants' conduct was so egregious as to be "conscience shocking." In evaluating the circumstances and reaching this conclusion, we are mindful of the Third Circuit's direction that we are to avoid sitting as a "zoning board of appeals." *United Artists*, 316 F.3d at 402 (citations omitted). Accordingly, we will enter judgment in favor of the defendants and against the plaintiffs on the plaintiffs' substantive due process claim. App. 37.

The Lindquists filed a timely appeal to the Third Circuit and sought *en banc* review. The Lindquists' request for *en banc* review was denied.

On appeal, the Third Circuit, in a two to one decision, affirmed the District Court. In its Opinion and Order dated July 19, 2004, the Third Circuit cited *United Artists* with approval and held that the "shocks the conscience" was the proper standard to apply to substantive due process claims against municipalities arising from land use decisions. The Third Circuit reasoned that, "without more, a violation of state law, even a bad faith violation of state law, will not support a substantive due process claim in a land-use dispute. The Third Circuit concluded that the conduct of the Township in this case did not rise to the level of "conscience shocking" behavior.

The Third Circuit further affirmed the District Court's denial of the Lindquists' motion for leave to amend their Amended Complaint on the basis of delay without requiring finding of prejudice on the part of the Township or burden on the District Court or bad faith on the Lindquists.

The Lindquists' sought *en banc* and/or panel rehearing, which request was denied by Order dated August 17, 2004.

REASONS FOR GRANTING WRIT

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUIT COURTS AS TO THE STANDARD NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN CASES INVOLVING MUNICIPAL LAND USE DECISIONS

The petition should be granted in this case because a significant split of authority exists among the circuits with respect to the standard to be applied in evaluating substantive due process claims against municipalities arising from land use decisions.

The First, Second, Sixth, and Eight Circuits confronted with substantive due process challenges to land use decisions are aligned with the Third Circuit in applying the "shocks the conscience" standard. *See Banks v. City of Whitehall*, 344 F.3d 550 (6th Cir. 2003); *Entergy, Arkansas, Inc. v. Nebraska*, 241 F.3d 979 (8th Cir. 2001); *Williams v. Denver, City and County of,* 99 F.3d 1009 (10th Cir. 1996); *Lawrence v. Achtyl,* 20 F.3d 529 (2d Cir. 1994); *Amsden v. Moran,* 904 F.2d 748 (1st Cir. 1990)

The Fourth, Seventh, Ninth and Eleventh Circuits appear to take the position that property interests are not protected by the substantive component of the due process clause of the Fourteenth Amendment. *See Squaw Valley Dev. Co. v. Goldenberg*, 2004 WL 1615077 (9th Cir.)(an alleged governmental interference with property rights is governed solely by the Fifth Amendment's Taking Clause and no basis for a substantive due process claim in a land use matter); *Greenbriar Village L.L.C. v. Mountain Brook City*, 345 F.3d 1258 (11th Cir. 2003)(property interests are not created by the Constitution and are not protected by substantive component of Due

Process Clause); *Esplanade Properties LLC v. City of Seattle*, 307 F. 3d 978 (9th Cir. 2002).

> The Fourth, Fifth and Seventh Circuits apply the rational basis test to determine whether there has been a violation of substantive due process by a municipal government in rendering a land use decision. *See Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002)(holding that the challenged zoning determination clearly did not fall beyond outer limits of legitimate governmental action ... the County's actions were rationally related to a legitimate governmental purpose.); *Durigan Sanitary Dist. No. 4 – Town of Brookfield*, 5 Fed. Appx. 492, 494-95 (7th Cir. 2001)(land use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a legitimate governmental interest.) *See also Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th cir. 1988).
>
> The District of Columbia Circuit applies a very deferential standard of review of substantive due process claims holding that "[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), cert. denied, 488 U.S. 956 (1988). Accord *George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003)

As demonstrated by the foregoing, the circuits are deeply divided on the standard to be employed by federal courts in reviewing land use decisions. *See e.g. Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992) (circuits deeply divided concerning the theories to be employed in federal court cases challenging zoning); *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911, 914 (2d Cir. 1989)(Federal courts have followed a somewhat uneven course in explaining the rationale for and the extent to which the substantive component of the Due Process Clause protects landowners in dispute with local agencies empowered to limit permissible uses of their property.)

Recently in the *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 123 S. Ct. 1389 (2003), this Court had the opportunity to but did not apply the "shocks the conscience" standard in evaluating a substantive due process claim in the land use context filed (as in this case) against a municipality and public officials acting in their official capacity. This Court determined that the refusal to issue building permits after approval of a site plan because of the city's submission of the land use determination to referendum procedure did not constitute "egregious or arbitrary government conduct". *Id.* at 1396. In reaching its decision, this Court cited to *Lewis* only for the general proposition that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'."

Likewise, *Lewis* did not resolve the conflict given Judge Souter express statement that "the issue of municipal

liability is not before us." 523 U.S. at 838 n.2. This Court in *Lewis* granted certiorari "to resolve the conflict among the Circuits *over the standard of culpability on the part of a law enforcement officer* for violating substantive due process *in a pursuit case*." 523 U.S. at 839 (emphasis added).

This Court should grant the petition to resolve the existing conflict on this fundamental constitutional issue. The "shocks the conscience" standard is not an appropriate standard to apply in substantive due process cases that do not involve emergency circumstances and that allow a state actor the opportunity to deliberate and give due consideration to his conduct. *See United Artists*, 324 F.3d at 134 (Nygaard, J. (*Opinion Sur Denial of Rehearing*)). As stated by Judge Nygaard:

> "Shocks the conscience" is useful in due process cases where the actor cannot deliberate. In those situations, exigencies may excuse deliberate indifference. Land use decisions are not made in the heat of the moment without ability to deliberate. Instead, they are (or should be) deliberate decisions made after proper consideration. The appropriate standard, as repeatedly articulated before and after Lewis is "improper motive". *Id.* at 135

> (*citing United Artists*, 316 F.3d at 405-06 (Cowen, J. *dissenting*)).

II. THE PETITION SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT'S DECISION THAT DENIAL OF A MOTION TO AMEND IS WARRANTED ON THE BASIS OF UNDUE DELAY WITHOUT A SHOWING OF PREJUDICE TO THE RESPONDING PARTY OR THE COURT OR BAD FAITH ON THE PART OF THE MOVING PARTY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

Amendment of pleadings in civil actions is governed by Rule 15(a) of the Federal Rules of Civil Procedure which provides that once an issue is joined in a lawsuit, a party may amend his pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice require."

Forty years ago, in *Foman v. Davis*, 371 U.S. 178 (1962), this Court had occasion to construe the foregoing portion of Rule 15 (a):

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim

> on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave should, as the rules require, be 'freely given'.

Id. at 182 (*citations omitted*). Ten years later in *Zenith Radio Corp. v. Hazeltine Research, Inc.* 401 U.S. 321, 330-331 (1971), this Court stated that in deciding whether to permit an amendment, the district court is "required to take into account any prejudice" to the non-moving party.[7]

The Third Circuit Decision in this case conflicts with relevant decisions of this Court in that it holds that a District Court is not required to consider prejudice to the non-moving party or burden on the court in deciding whether to permit an amendment to a pleading. This Court has not re-visited this

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7 Sixteen years earlier, in *Coventry v. United States Steel* Corp., 856 F.2d 514, 520 (3d Cir. 1988), a panel of the Third Circuit stated that "the obligation of the trial court in its disposition of the motion [for leave to amend] is to articulate the imposition or prejudice caused by the delay, and to balance those concerns against movant's reason for delay." Neither the Third Circuit nor the District Court in this case articulated any prejudice caused by the delay nor make any finding that the Lindquists harbored any bad faith or improper motive in bringing the motion. The District Court denied the motion to amend and the Third Circuit affirmed solely on ground of delay.

issue in a long time. Review is necessary to clarify this important area of the law to promote uniformity among all District Courts in the interpretation of Rule 15(a).

CONCLUSION

The petition should be granted to resolve a conflict among the circuits on a constitutional issue of national importance and to provide clear guidance to federal courts as to the appropriate standard of review and liability to be applied to cases alleging substantive due process violations by municipalities arising from their land use decisions. Additionally, the petition should be granted to resolve the Third Circuit's deviation from the long standing precedent of this Court regarding interpretation of a federal rule of civil procedure, which deviation may influence other courts in other circuits.

Respectfully submitted,

Barbara Anisko, ESQ.
Counsel of Record
Kaplin Stewart Meloff Reiter & Stein
350 Sentry Parkway
Bldg. 640, P.O. Box 3037
Blue Bell, PA 19422-2457
(610) 941-2457
Attorneys for Petitioner

Supreme Court, U.S.
FILED
04-681 NOV 15 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP AND THE BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPENDIX

BARBARA ANISKO, ESQ.
Counsel of Record
KAPLIN STEWART MELOFF REITER & STEIN
350 Sentry Parkway
Bldg. 640, P.O. Box 3037
Blue Bell, PA 19422-2457
(610) 941-2457
Attorneys for Petitioner

Wright Appellate Services, LLC 1107
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

APPENDIX

Appendix A – Sur Petition for Rehearing with Suggestion for Rehearing En Banc filed, August 18, 2004 ..... 1a

Appendix B – Order, dated August 10, 2004 ..... 4a

Appendix C – Judgment, dated July 19, 2004 ..... 6a

Appendix D – Opinion of the Court, filed July 19, 2004 ..... 9a

Appendix E – Order, dated September 19, 2003 ..... 47a

Appendix F – Order, dated May 29, 2003 ..... 49a

Appendix G – Findings of Fact and Conclusions of Law, filed April 15, 2003 ..... 51a

Appendix H – Order, dated April 15, 2003 ..... 72a

Appendix I – Order, dated June 13, 2002 ..... 74a

Appendix J – Order, dated November 20, 2001 ..... 76a

Appendix K – Opinion and Order, dated January 19, 2000 ..... 78a

APPENDIX A –SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC FILED, AUGUST 18, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-2431 and 03-2971

Case No. 03-2431

CORA F. LINDQUIST,
INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF JAMES O. LINDQUIST

v.

BUCKINGHAM TOWNSHIP;
BOARD OF SUPERVISORS OF BUCKINGHAM
TOWNSHIP; ERNEST KNIGHT II; LYNN BUSH,
EXECUTRIX OF THE ESTATE OF
GEORGE M. BUSH, ESQ.

Cora F. Lindquist,
Appellant

Case No. 03-2971

CORA F. LINDQUIST, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF JAMES O. LINDQUIST

v.

BUCKINGHAM TOWNSHIP; BOARD OF
SUPERVISORS OF BUCKINGHAM TOWNSHIP;
ERNEST KNIGHT, II; LYNN BUSH, EXECUTRIX
OF THE ESTATE OF GEORGE M. BUSH, ESQ.

Buckingham Township;
Board of Supervisors of Buckingham Township,
Appellants

Appeals from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 00-cv-01301)
District Judge: Honorable Harvey Bartle, III

Present: SCIRICA, *Chief Judge,* SLOVITER, NYGAARD,
ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, CHERTOFF, FISHER, VAN
ANTWERPEN, and ROSENN*, *Circuit Judges*;

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* Hon. Max Rosenn, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel rehearing.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellants having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, in the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell, Circuit Judge
Circuit Judge

Dated: August 17, 2004
AWI/cc: BA, DRU, MLB, HGM

APPENDIX B- ORDER, DATED AUGUST 10, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-2431 & 03-2971

CORA F. LINDQUIST, et al.
v.
BUCKINGHAM TOWNSHIP, et al.
Cora F. Lindquist,
Appellant in **03-2471**
Buckingham Township, et al.,
Appellants in **03-2971**
(E.D. of PA. Civil No. 00-cv-01301)

Present: RENDELL, BARRY and ROSENN, ***Circuit Judges***

Motion by Cora F. Lindquist, Appellant in 03-2431 and Appellee in 03-2971, requesting that the Court's Opinion be designated as a Precedential Opinion.

/s/ Anthony Infante

Anthony Infante
Case Manager 267-299-4916

Response due 8/19/04.

Petition for En Banc Rehearing is pending before the full Court.

ORDER

The foregoing motion is DENIED.

By the Court,

/s/ Marjorie O. Rendell
Circuit Judge

Dated: 10 August 2004
AWI/CC: HGM
MLB
BA
DRU

APPENDIX C- JUDGMENT DATED JULY 19, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-2431 and 03-2971

CORA F. LINDQUIST, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF JAMES O. LINDQUIST
v.
BUCKINGHAM TOWNSHIP;
BOARD OF SUPERVISORS OF BUCKINGHAM
TOWNSHIP; ERNEST KNIGHT II; LYNN BUSH,
EXECUTRIX OF THE ESTATE OF
GEORGE M. BUSH, ESQ.

Cora F. Lindquist,
Appellant in 03-2431

Buckingham Township;
Board of Supervisors of
Buckingham Township,
Appellants in 03-2971

Appeals from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 00-cv-01301)
District Judge: Honorable Harvey Bartle, III

Case No. 03-2431 Argued
Case No. 03-2971 Submitted Under
Third Circuit LAR 34.1 (a)
February 23, 2004

Before: RENDELL, BARRY and ROSENN, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and Appeal No. 03-2431 was argued and Appeal No. 03-2971 was submitted pursuant to Third Circuit LAR 34.1(a) on February 23, 2004. On consideration whereof, it is now here.

ORDERED and ADJUDGED by this Court that the Orders of the District Court entered on April 16, 2003 and June

4, 2003, be and the same are hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

Acting Clerk

Dated: 19 July 2004

APPENDIX D-OPINION OF THE COURT, FILED JULY 19, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-2431 and 03-2971

CORA F. LINDQUIST, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF JAMES O. LINDQUIST
v.
BUCKINGHAM TOWNSHIP;
BOARD OF SUPERVISORS OF BUCKINGHAM
TOWNSHIP; ERNEST KNIGHT II; LYNN BUSH,
EXECUTRIX OF THE ESTATE OF
GEORGE M. BUSH, ESQ.

Cora F. Lindquist,
Appellant in 03-2431

Buckingham Township;
Board of Supervisors of
Buckingham Township,
Appellants in 03-2971

Appeals from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 00-cv-01301)
District Judge: Honorable Harvey Bartle, III

Case No. 03-2431 Argued
Case No. 03-2971 Submitted Under Third Circuit LAR
34.1(a)
February 23, 2004

Before: RENDELL, BARRY and ROSENN, *Circuit Judges.*
(Filed: July 19, 2004)

Barbara Anisko [ARGUED]
Daniel R. Utain
Kaplin, Stewart, Meloff, Reiter & Stein
350 Sentry Parkway
P.O. Box 3037, Building 640
Blue Bell, PA 19422
Counsel for Cora F. Lindquist; Appellant in 03-2431
and Appellee in 03-2971

Harry G. Mahoney [ARGUED]
Michael L. Barbiero
Deasey, Mahoney & Bender
1800 John F. Kennedy Boulevard
Suite 1300
Philadelphia, PA 19103-2978
Counsel for Buckingham Township and Board of Supervisors of Buckingham Township, Appellees in 03-2431 and Appellants in 03-2971

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Cora F. Lindquist, individually and as executrix of the estate of James O. Lindquist, appeals the District Court's order granting judgment in favor of Buckingham Township and the Board of Supervisors of Buckingham Township on the Lindquists' civil rights action under 42 U.S.C. § 1983. This case presented, at both the district court level and on appeal before us, a heavily fact-laden saga of the attempted development of land by plaintiffs, seemingly thwarted at every turn by defendants. The plaintiff's forty-five page complaint leveled allegations of bad faith and conspiracy against defendants based on their conduct. The District Court held a six-day non-jury trial, hearing first hand both sides of the story. Before the District Court's twenty-one page opinion issued, we made clear in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.2d 392 (3d Cir. 2003), that

the standard applicable to substantive due process claims involving executive action in land-use disputes is the "shocks the conscience" standard. The District Court held that "there [was] nothing in the facts...to prove that the defendant's conduct was so egregious as to be 'conscience shocking.'" We can find nothing in the record that would cause us to find error in the District Court's reasoning or ruling. Our dissenting colleague paints a picture of dastardly deeds, and, while we might credit such a portrayal if the trial court had perceived in the extensive recounting of the saga the reprehensible animus, attitude and scheming upon which the dissent relies, that is not the case. Moreover, the objective facts, as revealed in the hefty 5,559-page appendix before us, do not necessarily take us in the direction the dissent suggests, causing us to find no error. Clearly, we and the trial judge just view the record differently from our dissenting colleague. We see no clear-cut constitutional violation and will therefore affirm.

I.

The Lindquist farm, located between York Road and Upper Mountain Road in Buckingham, Pennsylvania, consists of a 100-acre parcel owned by James O. Lindquist and Cora F. Lindquist, and 150-acre parcel owned by James O. Lindquist and his three children.[1] Beginning in early 1994, the Lindquists sought to develop the property as a cluster

[1] James O. Lindquist died while this case was before the District Court. Cora F. Lindquist was substituted as executrix of his estate.

subdivision. Throughout 1994 and 1995, they and their representatives worked with the Township its Board of Supervisors, its Planning Commission and its consultant to facilitate the proposed development of the property.

Based on these discussions, the Lindquists prepared a set of preliminary plans. Development was to occur in two stages: Phase I, consisting of 111 single-family lots on the front parcel, and Phase II, consisting of 110 single-family lots on the back parcel. On March 29, 1996, the Lindquists submitted an application for preliminary subdivision approval of Phase I ("Original Phase I Plan").

The Township's consultants evaluated the Original Phase I Plan for compliance with the Township's Subdivision and Land Development Ordinance ("SALDO") and the Zoning Ordinance.[2] It was understood that waivers from certain SALDO requirements would be necessary before the plan would be approved, and there appeared to be no objection to these waivers at a May 1, 1996 meeting of the Planning Commission. However, later that month, one consultant issued a review letter concerning the plan's proposed storm water management facilities that imposed upon plaintiffs what they believed to be "onerous" and unwarranted requirements with respect to water run-off.

---

[2] Under SALDO, a party seeking subdivision and land development approval must first file an application and plans for preliminary approval by the Board. In addition, the party must also submit an application for final plan approval. The Board is the only Township entity with the authority to grant approvals and denials of these plans.

The Lindquists made a formal request for SALDO waivers to the Board on August 9, 1996. The Board took no action on the waiver request, but recommended that the Lindquists meet further with the Township staff to settle the waiver and other issues. The Lindquists met several times with the Township staff, but the parties were unable to reach a compromise that would be accepted by the Board. Finally, the Lindquists went back to the Board for clarification, submitted two proposed plans, including the Original Phase I Plan and a "by-right" alternate plan that met all SALDO requirements.[3] In response, the Board: (1) directed the Lindquists to proceed with the Original Phase I Plan; (2) consented to grant the SALDO waivers necessary to develop the property under the Phase I Plan; (3) determined that the Plan would be processed under the August 24, 1994 Zoning ordinance, as amended December 13, 1995; and (4) required the Lindquist to work with the Township to develop a wastewater system that would integrate the development with the regional sewage system.

In late 1996 and early 1997, the Lindquists and the Township's consultants worked on the wastewater issue. Meanwhile, the Board enacted an amendment to SALDO that prohibited cul-de-sac streets within subdivisions and an

---

[3] The zoning ordinance permitted the cluster subdivision of a property as a "by-right" use. Thus, the Board would have been required to accept this alternative plan if formally submitted. However, the alternate plan would have subdivided and developed a portion of the property that the Township wanted to preserve.

Amendment to the Zoning Ordinance which eliminated cluster subdivisions as a "by-right" use.

In early June, the Township informed the Lindquists that the Original Phase I Plan would be on the Board's agenda at its June 25, 1997 meeting. The Lindquists informed the Township that they intended to submit a revised Phase I plan within the next few weeks, and proposed that the ninety-day statutory review period for the Original Phase I Plan be extended, as had been done several times throughout the process. The Board did not accept this proposal, and rejected the application for preliminary approval of the plan ("the First Denial Resolution"). As the result of this denial, any new proposals submitted by the Lindquists would be subject to the zoning amendments enacted in early 1997.

On September 3, 1997, the Lindquists commenced legal proceedings against the Board in the Court of Common Please of Bucks County. These actions were resolved by a stipulation of settlement signed by the parties on November 12, 1997, and entered as a Court Order on December 12, 1997 ("the December 1997 Order"). Under the terms of the settlement, the Board withdrew the First Denial Resolution and permitted the submission of revised Phase I plans to be reviewed under the Zoning Ordinance and SALDO as they existed on December 13, 1995. The settlement did not address the issue of how many times the Lindquists would be permitted to submit further revised plans.

On November 18, 1997, the Lindquists submitted a revised Phase I subdivision application ("Revised Phase I Plan"). In early 1998, the Lindquists and the Township met

several times to discuss the Revised Phase I Plan. The Lindquists agreed to submit a further revised plan ("Further Revised Phase I Plan"), and the Board agreed to extend the review period for the Further Revised Phase I Plan to July 30, 1998.

On July 20, the Lindquists informed the Township that the Further Revised Plan I would be submitted by the end of July, and proposed that the review period be extended until the end of August. The Township declined to extend the review period.

On July 22, the Board passed a resolution ("Second Denial Resolution"), which was apparently intended to reject the Revised Phase I Plan. However, the resolution actually rejected the Original Phase I Plan. The Board subsequently realized it had rejected the wrong plan, and on August 12, 1998, passed a new resolution that "readopted and confirmed" the Second Denial Resolution and amended it to include a rejection of Revised Plan ("Third Denial Resolution").

Meanwhile, the Lindquists had filed the Further Revised Phase I Plan on July 31, 1998. The Township accepted the Further Revised Plan, but informed the Lindquists that it would not treat the Further Revised Plan as a revised plan under the December 1997 Order for the reason that the Second Denial Resolution had denied the subdivision application. The Third Denial Resolution set an August 31, 1998 deadline for review of the Further Revised Plan. The Lindquists informed the Township that it was obligated to

treat the Further Revised Plan as a revised plan under the settlement, and that, if it treated the Further Revised Plan as a new plan, they were entitled to a ninety-day review period as provided by statute.

The Board disagreed. On August 26, 1998, the Board adopted another resolution ("Fourth Denial Resolution"), which rejected the Further revised Plan as a revised plan. The Township also informed the Lindquists that it would accept the Further Revised Plan as a new plan, subject to review under the Zoning Ordinance and SALDO as they existed on the dated of its submission. The Board eventually rejected the Further Revised Plan as a new plan on October 28, 1998.

On September 3, 1998, the Lindquists filed a mandamus action in the Court of Common Pleas of Bucks County, alleging that the Revised Plan should be "deemed approved" under § 508 of the Municipalities Planning Code, Pa. Stat. Ann. tit 53, § 10508. On January 19, 2000, the Bucks County Court held that the Second Denial Resolution of July 22, 1998 had rejected the wrong plan, that the Board had failed to comply with § 508 through its failure to take action on the Revised Plan by the July 30, 1998 deadline, and that, as a result, the Revised Plan was "deemed approved." In his opinion, Judge Clark found that "the Township ha[d] acted in this case not only in violation of Order of December 12, 1997 of the Bucks County Court, but also in violation of its own ordinances requiring review of subdivision applications." However, the basis for the court's ruling that the Revised Plan was "deemed approved" was the Township's failure to reject the Revised Plan by the statutory deadline.

The Township appealed the Bucks County Court Order. However, in December 2000, the parties reached a settlement that ended the state court litigation, but permitted the Lindquists to proceed with this action alleging violations of their substantive due process rights, which they had filed in federal court in March of that year. The District Court, following a six-day non-jury trial, ultimately granted judgment in favor of the Township and its Board of Supervisors.

II.

The Lindquists' appeal challenges several aspects of the District Court's ruling, including: (1) the application of the "shocks the conscience" standard to their substantive due process claim; (2) the determination that the Township's actions did not violate the "shocks the conscience" standard; (3) the denial of their motion to amend their complaint to include an equal protection claim; (4) the failure to give preclusive effect to certain state court findings; and (5) the decision to exclude evidence regarding the Township's treatment of other subdivision plans. The Township and the Board of Supervisors appeal the District Court's denial of their post-trial motion for attorneys' fees and costs.

A.

First, the Lindquists' contend that the District Court erred in applying the "shocks the conscience" standard because such a standard is inappropriate to apply to substantive due process claims against municipalities arising from land use

decision. We exercise plenary review over the District Court's choice and interpretation of legal standards. *Beta Spawn, Inc. v. FFE Transportation Services, Inc.*, 250 F.3d 218, 223 (3d Cir. 2001).

In *United Artists*, we noted that "our cases have repeatedly acknowledged that executive action violates substantive due process only when it shocks the conscience." *Id.* At 399-400. We saw no reason why land-use cases should be exempted from the shocks-the-conscience test, stating that "[l]and-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." *Id.* At 401-02. Accordingly, we conclude that the District Court applied the proper standard to the Lindquists' claim.

B.

Second, the Lindquists argue that "the Township deliberately acted in bad faith, violated its own ordinances and customary practices and procedures and violated two separate court orders," and that "[t]he Township participated in such egregious conduct because of their personal animus to [the Lindquists' representative] and with the intent of preventing the Lindquists from developing their property so that the Township would be in a better position to acquire the Lindquist property at a minimal cost to the Township." The District Court concluded that the Township "may have been negligent at times and in 1998 may have acted with improper motive toward the Lindquists and their representatives. However, there is nothing in the facts we have found to

prove that the defendants' conducts was so egregious as to be 'conscience shocking.'" The Lindquists maintain that this conclusion is in error and that the Township's actions do satisfy the standard.

We exercise plenary review over the District Court's application of legal standards to the facts of the case. *Beta Spawn*, 250 F.3d at 223. We review the District Court's findings of fact for clear error. *Id.*

In *United Artists*, we joined other Courts of Appeals in applying the "shocks the conscience" standard to substantive due process claims in land use disputes. For example, in *Chesterfield Development Corp. v. City of Chesterfield,* 963 F.2d 1102 (8th Cir. 1992), a developer brought a § 1983 action claiming that the city had violated its substantive due process rights by enforcing an invalid zoning plan against it. In affirming the District Court's denial of the developer's claim, the Eighth Circuit stated that "a state-law error, no matter how fundamental, cannot in and of itself create a federal due-process violation." *Id.* at 1105. Furthermore, it noted that "[its] decision would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith" because "[a] bad faith violation of state law remains only a violation if state law." *Id.* In its view, the enforcement of an invalid zoning ordinance was not a "truly irrational" governmental action giving rise to a substantive due process claim. *Id.*

The First Circuit considered a similar situation in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991). There, a developer brought a civil rights action against a Puerto Rico agency following the agency's rejection of the developer's application for a construction permit. The court held that "[the developer's] allegations that [agency] officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim." *Id.* At 32. The court also stated that "even assuming that [the agency] engaged in delaying tactics and refused to issue permits for the ...project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution." *Id.*

These cases stand for the proposition that, without more, a violation of state law, even a bad faith violation of state law, will not support a substantive due process claim in a land-use dispute. *See also Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000) ("[E]ven an arbitrary denial of [a building] permit in violation of state law – even in bad faith – does not rise above the constitutional threshold for equal protection and substantive due process claims."); *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999) ("Arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend the substantive component of the Due Process Clause.") Rather, the governmental action must be so egregious and extraordinary that it "shocks the conscience."

Here, we are not entirely convinced that there has ever been a violation of state law, much less any "conscience-shocking" behavior. The Lindquists maintain that the Township's actions were in defiance of the December 1997 Order. We view this to be not entirely clear-cut. And, even if the Township did violate the Order, the record is largely devoid of any facts that would suggest that the Township's actions were so egregious and extraordinary that they "shock the conscience." The Lindquists have suggested that the Township was motivated by financial concerns and bias against their attorney, and these motivations render the Township's actions "conscience-shocking." Yet, we find little evidence that the Township or its officers were motivated by pecuniary gain. In addition, although it is clear that the relationship between the Township and the Lindquists' attorney became bitter during the course of these events, the Township's actions cannot be said to have been due to any bias against him. The District Court concluded that while the Township "may have been negligent" and "may have acted with an improper motive," desirous of thwarting development of the property, its conduct did not shock the conscience. We concur.

Our dissenting colleague cites *Leamer v. Fauver,* 288 F.3d 532 (3d Cir. 2002), for the proposition that "deliberate indifference" and "protracted failure to even care" may be conscience shocking when officials have time to make unhurried judgments. *Id.* At 547. However, *Leamer* involved a prison inmate challenging the deprivation of a liberty interest. Given that "[t]he assessment of what constitutes conscience-shocking behavior differs according to the factual setting,"

id., the test may be more easily satisfied in a prison setting than in a land-use setting. More importantly, our view of the record does not indicate indifference or a failure to care on the part of the Township.

C.

Third, the Lindquists challenge the District Court's denial of their motion for leave to amend their complaint to include an equal protection claim, based on the Township's favorable treatment of a third party's subdivision application. We review a grant or denial of leave to amend for abuse of discretion. *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000).

The Supreme Court has stated that the Rule 15(a) mandate that leave to amend "shall be freely given when justice so requires" is to be heeded.

> In the absence of any apparent or declared reason- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. - the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Here, the District Court denied the Lindquists' motion to amend for "undue delay." With regards to the issue of delay, our Court has stated that

> the passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become "undue," placing an unwarranted burden on the court, or will become "prejudicial," placing an unfair burden on the opposing party. The question of undue delay, as well as the question of bad faith, requires that we focus on the plaintiff's motives for not amending their complaint to assert this claim earlier; the issue of prejudice requires that we focus on the effect on the defendants.

Adams v. Gould, Inc., 739 F.2d 858, 868 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (internal citations omitted). *See also Cureton v. NCAA*, 252 F.3d 267, 273 (3d Cir. 2001) (stating that "the question of undue delay requires that we focus on the movant's reasons for not amending sooner"). Here, in its discussion, the District Court followed our directive in *Adams* that the Court should focus on the plaintiff's motives. First, it noted the Lindquists' proffered reason for their two-year delay, namely, the Township's alleged failure to turn over certain documents. Then, it disposed of this reason because the documents were public documents to which the Lindquists had access and, in addition, the Lindquists could have filed a motion to compel production. In light of this reasoning, and given the fact that this case had already been pending for two years and was already for trial, we cannot say that the District Court abused its discretion in denying the Lindquists leave to amend.

D.

Fourth, the Lindquists urge that the District court erred when it failed to give preclusive effect to certain findings outlined in the state court's January 19, 2000 order. We exercise plenary review over the District's Court decision regarding the preclusive effect of a state court judgment. *Del. River Port Auth. v. Fraternal Order of Police,* 290 F.3d 567, 572 (3d Cir. 2002)

The Full Faith and Credit Act, 28 U.S.C. §1738, requires a federal court to give a state court judgment the same preclusive effect that it would be entitled to in a court of that state. *Gregory v. Chehi*, 843 F.2d 111, 118 (3d Cir. 1988). Thus, the District Court was required to give the state court's findings preclusive effect if a Pennsylvania court would have been required to give them preclusive effect.

Turning to Pennsylvania law, we note that Pennsylvania has adopted the requirements of Restatement (Second) of Judgments, regarding when a prior determination of a legal issue is conclusive in a subsequent action. *Clark v. Troutman,* 502 A.2d 137, 139 (Pa. 1985). In Pennsylvania, the doctrine of issue preclusion applies if: (1) the issue decided in the prior case is identical to the one presented in the subsequent action; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the subsequent case; (4) the party or person in privity with a party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment. *City of*

Pittsburgh v. Zoning Bd. of Adjustment, 559 A.2d 896, 901 (Pa. 1989).

Here, the January 19, 2000 state court order concluded that the Lindquists' Revised Plan was "deemed approved" under § 508 of the Municipalities Planning Code, Pa. Stat. Ann. Tit. 53 § 10508. In concluding that the Plan was "deemed approved," the Court of Common Pleas relied solely upon facts related to the Township's Board of Supervisors' failure to take action upon the Plan prior to the statutory deadline. While the court did make other findings and agreed with the Lindquists that the Township had acted in violation of both its own ordinances and the December 1997 Order, these findings were not essential to its final judgment. Accordingly, issue preclusion does not apply. As a result, the District Court's decision to give preclusive effect only to the facts that the Board had failed to take timely action and that the Revised Plan was "deemed approved" upon the Township's failure to take action, while not giving preclusive effect to any other state court findings, was appropriate.

E.

Fifth, the Lindquists claim that the District Court abused its discretion in making certain evidentiary rulings. During the course of the trial, the Lindquists sought to introduce documents and to solicit testimony regarding the Township's treatment of a third party's subdivision application, the Yerkes/Orleans plan, that was pending during the same time period when the Lindquists' application was being considered, as relevant to the issue of motive. In sustaining the Township's objection, the District Court noted that evidence

regarding the Yerkes/Orleans application was not necessarily probative of whether the Township had acted improperly with regards to the Lindquists' application because there were different facts, because the Township could exercise discretion in granting waivers, and because the complexity and uniqueness of these situations makes comparisons cumbersome if not impossible. We review the District Court's ruling regarding the admissibility of evidence for abuse of discretion. *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375 (3d Cir. 2002).

In assessing whether the Lindquists had proven their claim, the key question before the Court was whether the Township's treatment of the Lindquists "shocked the conscience," not whether the Township treated the Lindquists differently than it treated a third party. The evidence the Lindquists sought to introduce had nothing to do with the Township's treatment of the Lindquists.[4] Further, even if it

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[4] The dissent posits that even if the evidence of the treatment afforded Yerkes/Orleans was not probative of the motive of the Township vis a vis the Lindquist, it could be probative as to whether the treatment "shocked the conscience." We are at a loss to determine how this could be so unless the facts of the two situations were the same. The Lindquists contend that the same sixty reasons listed to justify denial of their application were listed as conditions for approval of the Yerkes/Orleans preliminary plan, and the dissent appears to read this contention as meaning the Lindquists' plan was rejected for the same reasons as the Yerkes/Orleans plan was approved. However, the record merely indicates that the Township had some of the same problems with the Lindquists' plan that the Township's consultants had with the

were arguably relevant, we agree with the District Court that ascertaining whether the Yerkes/Orleans development was comparable to the Lindquist development in all important respects would have forced the District Court to conduct "a trial within a trial." As a result, we conclude that the District Court did not abuse its discretion in refusing to permit the introduction of this evidence.[5]

Yerkes/Orleans preliminary plan, and that the consultants conditioned their recommendations regarding approval of the Yerkes/Orleans plan on these problems being rectified. It does not indicate what steps the Yerks/Orleans developers took to address the problems identified in the preliminary plan, nor that the final Yerkes/Orleans plan eventually approved by the Township continued to exhibit these problems. The proffered evidence would only be relevant to the District Court's inquiry to the extent that the facts of the two proposed developments were virtually identical. Considering the maxim that every parcel of land is unique, this was highly unlikely.

[5] Our dissenting colleague believes that, as an alternative to finding a constitutional violation, we should remand the claim so that the Lindquists could have the opportunity to present new evidence in light of the heightened standard adopted between the close of trial and the District Court's judgment. While we have, as the dissent points out, acknowledged that " a change in law may warrant the reopening of a case where additional [evidence] would be pertinent to the change of law, " *Skehan v. Bd. of Trustees of Bloomsberg State College,* 590 F.2d 470, 479 (3d Cir. 1978), *rev'd on other grounds by Smith v. City of Pittsburgh,* 764 F.2d 188 (3d Cir. 1985), here the Lindquists did not move to reopen for additional proof in light of the changed standard.

F.

Finally, the Township and the Board claim the District Court erred when it denied their motion for attorneys' fees. We review a denial or grant of attorneys' fees for abuse of discretion. *Loughner v. University of Philadelphia*, 260 F.3d 173, 177 (3d Cir. 2001).

42 U.S.C. § 1988 provides that "in any action or proceeding to enforce a provision of § ...1983...the court, in its discretion, may allow the prevailing party, other that the United States, a reasonable attorney's fee as part of the costs." A prevailing defendant is entitled to attorney's fees upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation. *Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 157-58 (3d Cir. 2001).

The Township and the Board of Supervisors contend that they, as prevailing defendants, are entitled to attorneys' fees because the Lindquists' lawsuit was not brought to redress the Lindquists' alleged constitutional grievances, but rather to generate attorneys' fees for the Lindquists' legal representative. Even if we were to credit this theory, it does not necessarily render the action frivolous, unreasonable or without foundation. We note that at the time the Lindquists brought this action, the standard applicable to their due process claim was not settled. Only after the conclusion of trial did we announce in *United Artists* that a plaintiff pursuing a substantive due process claim in a land-use dispute must prove that the defendant's conduct "shocked the conscience." 316 F.3d at 401. This standard departed from our prior precedent, under which a plaintiff merely had to prove that the defendant

had acted with an improper motive. *See, e.g. Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988). Here, the District Court stated that the Township and the Board "may have acted with an improper motive toward the Lindquists and their representatives," which would suggest that it might have been possible for the Lindquists to prevail under the "improper motive" standard. In light of the fact that the Lindquists might have been able to succeed under the standard in effect at the time they brought their claim, we cannot say that the action was frivolous, unreasonable or without foundation. Accordingly, the District Court did not abuse its discretion in denying attorneys' fees.

III.

For the reasons stated above, we will affirm.

Lindquist v. Buckingham Township, et al.

Nos. 03-2431, 03-2971

ROSENN, Circuit Judge, dissenting.

In the struggle to develop their land in Buckingham Township, Pennsylvania, the Lindquists encountered severe resistance from Township officials. The officials frustrated the Lindquists' efforts and wasted their time and resources. Because the majority holds that the Township's conduct is not sufficiently "conscience shocking" to constitute a viola-

tion of the Lindquists' substantive due process rights, I respectfully dissent.[6] Additionally, because the legal standard for this substantive due process claim changed while the District Court deliberated in this case, I believe the claim should be remanded so that the Lindquists may have the opportunity to present evidence that is now relevant under the new heightened standard. Lastly, I disagree with the majority's interpretation of our circuit's case law regarding a plaintiff's ability to amend a complaint. I believe that because the District Court's analysis of the Lindquists' motion to amend failed to articulate any undue burden on the court or prejudice to the non-moving party, denial of the motion was an abuse of discretion.

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[6] The majority defers heavily to the District Court's finding after a six day trial that nothing in the facts "was so egregious as to be 'conscience shocking,'" and fails to find error in the District Court's reasoning or ruling. (Maj. Op. at 3-4) While clear error review applies to the District Court's findings of fact, the application of those facts to the "conscience shocking" standard is a legal question that we review *de novo*. *See, e.g., Srein v. Frankford Trust Co.*, 323 F.3d 214, 220 (3d Cir. 2003) (discussing the "mixed" standard of review). I take no exception to the facts as described by the District Court, and I also find the facts described by the Court of Common Pleas of Bucks County after its lengthy trial to be informative. However, after finding the facts, the District Court offered little analysis, and simply stated in conclusory fashion that these facts did not rise to the "shock the conscience" standard. I disagree with both the majority and the District Court because in my opinion, the facts presented in this record display arbitrary and malicious conduct on the part of the Township that rises to a conscience shocking level.

I.

The majority has explained the basic sequence of events that occurred between the Lindquists and the Township during the six year development application ordeal. I write to supplement the factual account, and to explain several points of divergence between us.

A. The Township's Misconduct

Even though the standard for this substantive due process claim changed from "improper motive" to "shocks the conscience" while the District Court deliberated in this case, the District Court still acknowledged in its opinion that the Township "may have acted with an improper motive toward the Lindquists and their representatives." Although improper motive is no longer sufficient to prove a substantive due process violation, identifying an improper motive is a factor in the conscience shocking behavior of a state actor. The Court of Common Pleas of Bucks County candidly addressed the Township's improper motive, acknowledging that "the Township proudly admits that it would like to preserve the Lindquist property." The Township's motivation to preserve the Lindquists' land was improper because under the zoning and land-use ordinances in effect at the time of the Lindquists' initial application, the cluster subdivision developments they sought were allowed on the Lindquists' land as a "by-right" use.

As the majority opinion acknowledges, the Township Board of Supervisors (the "Board") requested that the Lindquists forego their by-right use and pursue an alternate plan favored by the Board, in exchange for assurances that the Board would grant the required SALDO waivers and process the plans under the zoning ordinances as amended December 13, 1995 (the "1995 ordinances"). However, after inducing the Lindquists to surrender their by-right use of the cluster development, the Board rejected the plan revisions in June of 1997 and denied the original plans in Resolution No. 1533. This action forced the Lindquists to resubmit new plans to be reviewed now under the zoning ordinances as amended in 1997. This action was significant because the 1997 amendments to the ordinances prohibited several of the items in the Lindquists' original plans, and strategically removed by-right use. This action set the tone for a series of other bad faith maneuvers launched by the Township against the Lindquists.

In response, the Lindquists filed suit against the Township in the Court of Common Please of Bucks County. The parties agreed to a settlement, which was entered as a court order (the "Court Order") requiring that the Township withdraw its denial of the plans and permit the Lindquists to submit revised plans to address the comments raised by the Township.

The majority here asserts that the settlement did not address how many times the Lindquists would be allowed to submit further revised plans after the original resubmission. However, the Court Order clearly stated that "[t]he Board

will process and review the Revised Plans for Phase I, and *any revisions thereto* in accordance with the Zoning Ordinance and SALDO, as they existed on December 13, 1995." (emphasis added) So, while the Court Order may not have explicitly stated how many revisions would be allowed, it clearly anticipated the need for multiple revisions and required that *any* revisions would be considered under the 1995 ordinances.

The Board realized that as long as the Lindquists were cooperating with the Township Planning Commission and consultants to revise and improve the original plans, the Court Order required that the Board consider the plans under the 1995 ordinances, and this would eventually lead to an approval. Therefore, the Board adopted a strategy to work around the Court Order almost immediately after the Order was signed. For example, the District Court acknowledged that "[a]t the Board's direction, the Planning Commission had treated the revised plans as a new filing that did not relate back to the earlier submission." Even in its pleadings before the Court of Common Pleas, the Township admitted that it attempted to reject the revised Phase I subdivision plan because it knew that the Lindquists "were getting closer to compliance with the Township Ordinances and wanted to reject the Revised Phase I Subdivision Plan before the Lindquists submitted any further revised plans."

Furthermore, during deposition, the Township Manager, Deborah Rendon, admitted the following:

> Q: So they acted – the Board of Supervisors acted to deny the revised subdivision application before the Lindquists had an opportunity to submit further plans to the Township, even though the [Court Order] specifically permitted further revised plans to be submitted, right?
>
> A: Yes.

The Township argues that after the Court Order was signed in 1997, it proceeded in good faith, as evidenced by a series of six meetings between the Lindquists and the Planning Commission aimed at reaching an agreement on the plans. To begin, this argument is undercut by the Township's admission that it rejected the plans because the Lindquists were getting closer to compliance. Furthermore, the Township's claim of good faith is absurd, in light of the shameless tactics on which the Township embarked in its effort to reject the plans.

As the majority recognizes in its footnote 2, the Board was the only Township entity empowered to approve the Lindquists plans. Any amount of progress made between the Lindquist and the Planning Commission was irrelevant if the Board had predetermined that it would not provide its approval. On July 22, 1998, when the Township's deadline for taking action on the plans was fast approaching, the Board rejected a routine request from the Lindquists to submit further revised plans and hastily enacted Resolution No. 1598 rejecting the plans. The District Court noted that "the

Lindquists had no prior knowledge that the Board was set to act on the plan on this date." (D. Ct. Op. at 12) In its haste, the Board actually denied the wrong plans, and the deadline for action on the Lindquists' most current submission passed. In an attempt to correct its mistake, the Board adopted Resolution No. 1599 rejecting the most current plans.

In the meantime, the Lindquists submitted a revised set of plans and argued that the Board had violated the 1997 Court Order by not considering them to be revised plan subject to consideration under the 1995 ordinances. Alternatively, the Lindquists argued that if the plans were in fact a new submission, they were entitled to a 90-day statutory review period including review letters by the Township's consultants. (D. Ct. Op. at 13) The Board disagreed, and less than one month after receiving the latest submission, the Board enacted Resolution No. 1600 denying Lindquist's most recent submission without full review. This denial was issued on the same day that the Township consultants submitted their review letters, leaving the Lindquists no conceivable opportunity to respond to the comments. (D. Ct. Op. at 13)

Throughout this process, the Township flagrantly violated its own ordinances and procedures, as well as the 1997 Court Order. To further underscore the Board's bad faith and arbitrary approach, the first 57 reasons for denial stated in Resolution No. 1600 in August 1998 were the same reasons verbatim as those listed in the first denial filed in June of 1997, Resolution No. 1533 (D. Ct. Op. at 13) However, in the intervening 14 months, the Lindquists had addressed all of those issues. Thus, it became clear that the Board did not

actually evaluate the Lindquists' plans, but arbitrarily denied them. The Township's claim that the Lindquists were provided with a meaningful review process and access to the Planning Commission to negotiate acceptable plans is disingenuous. The Township actually wasted the Lindquists' time and resources in seeking an approval when the Township knew that it had no intention of ever granting it.

B. Conscience Shocking Standard

In *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003), this court adopted a new heightened standard for substantive due process cases in the land-use context. "Improper motive" was no longer the standard; the new standard was conduct that "shocks the conscience." Therefore, it is no longer sufficient for a developer to prove that a state actor intentionally worked against the developer's interests in violation of state laws or ordinances. The developer must now show that the state actor's behavior was so egregious that it was "shocking." Despite the inherently subjective nature of this inquiry, the courts have attempted to set some guiding standards in this area. For example, when a suit is brought against a state actor challenging conduct in response to an emergency situation, "more culpability is required to shock the conscience to the extent that the state actors are required to act promptly under pressure." *Schiber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003). Conversely, when officials have time to make unhurried judgments, as was true in this case, indifferences and "protracted failure even to care" may be

truly conscience shocking. *Leamer v. Fauver*, 288 F.3d 532, 547 (3d Cir. 2002).[7]

The First Circuit has explained that "even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991) (on petition for rehearing). Furthermore, "mere bad faith refusal to follow state law in such local administrative matters simply does not amount to deprivation of due process where the state courts are available to correct the error." *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983).

In *United Artists,* this court agreed with the Court of Appeals for the First Circuit that the federal courts should not sit as a "zoning board of appeals," particularly when state courts are available for such a task. 316 F.3d at 402 (citing

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[7] The majority at p.14 distinguishes *Leamer* because it deals with a liberty interest in a prison setting, where the conscience shocking standard may be more easily satisfied. Yet, state actors in a prison setting share a commonality with municipal zoning boards; they both maintain complete control over their subjects' interests and may abuse their positions of power if they fail to follow their designated rules and regulations. In both instances, the Constitution may be the only check on abusive practices, regardless of whether it is a liberty or a property interest at stake. When state actors show egregious indifference, bordering on malfeasances and contempt in my view of this case, Constitutional protection is appropiate.

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982). I, of course, agree. However, in this case the Lindquists sought relief in the state courts, but the Township blatantly ignored the state Court Order. The Township persisted in arbitrary and abusive treatment toward the Lindquists. Our court has observed that "'the core of the concept' of due process is 'protection against arbitrary action' and that 'only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *United Artists*, 316 F.3d at 399 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998)). In my view, the Township deliberately played cat-and-mouse with the Lindquists, wasting their resources and time for a half-dozen years, arbitrarily denying multiple versions of their applications for a development to which they were initially entitled as a matter of right. To this arbitrary and egregious behavior, the Township added insult to injury by flagrantly disobeying the county Court Order.

When a township lures one of its landowners to give up a right established by township ordinance, induces him to comply with its demands for development approval only to have such compliance arbitrarily rejected, deliberately engages in a frustrating pattern to waste the landowner's resources and time over a period of years, and then flagrantly disregards the Order of a state court, such egregious conduct "shocks the conscience" in a constitutional sense. Under such circumstances, I disagree with the majority and the District Court; a federal court should grant relief.

II.

The Lindquists also claim that the District Court abused its discretion by denying their attempt to introduce evidence regarding the Yerkes/Orleans application, a neighboring land owner's application for a similar development project that was approved by the Township without any of the strong resistance encountered by the Lindquists. The majority finds no abuse of discretion because the evidence does not involve the Township's treatment of the Lindquists, and because it could not aid the Court in determining whether the treatment "shocked the conscience." I do not agree.

When the District Court ruled on this evidence at trial, it was still operating under the "improper motive" standard. The Court clearly stated that favorable treatment of a similar development application would not be relevant to determine if there was "improper motive" towards the Lindquists' application. However, after the trial concluded, but before issuing its decision, this court issued its decision in *United Artists*, changing the standard of review to "shocks the conscience." Although evidence relevant to a determination of an "improper motive" might have been limited to the interaction between the Lindquists and the Township, "shocks the conscience" is a much broader standard. Under this standard, therefore, a wider range of evidence is relevant.

In *United Artists*, we noted that "the measure of what is conscience-shocking is no calibrated yard stick." 316 F.3d at 399 (quoting *Lewis*, 523 U.S. at 847). Rather, "conduct that is sufficiently egregious to shock the conscience varies depending on the *context*." *United Artists*, 316 F.3d at 399 n.5

(emphasis added). Under this standard, evidence of the Township's treatment of a similar application much more favorably than the Lindquists' and with much greater dispatch could provide important information and perspective to show "conscience shocking" conduct.

The Lindquists assert that denying the multiple iterations of their plan outright, rather than approving it with conditions, was not the standard practice for the Township. The Lindquists proffer that the Yerkes/Orleans application for a cluster subdivision development submitted in January 1997 was almost identical to the Lindquists application. The Township approved the Yerkes/Orleans application after only six months of review with 276 conditions and comments. In contrast, the Lindquists' plans were denied after four years of review based on 60 comments. After reviewing Township records, the Lindquists determined that the same 60 reasons listed to justify denial of the Lindquists' application were also listed as conditions for approval in the Yerkes/Orleans application. If the Lindquists could substantiate these claims with reliable evidence, I believe that the evidence would be an important relevant factor in the fact finder's determination with the other evidence referred to above, whether the Township was acting with the requisite level of capriciousness that "shocks the conscience."

We have acknowledged that "a change in legal standards may warrant the reopening of a case where additional testimony would be pertinent to the change of law." *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 479 (3d Cir. 1978) *rev'd on other grounds by Smith v.*

City of Pittsburgh, 764 F.2d 188 (3d Cir. 1985). Precedent in this circuit and simple fairness require that this case be remanded to allow the Lindquists the opportunity to present all of their evidence that would now be relevant under the new standard established in *United Artists*.

III.

The District Court denied the Lindquists' motion to amend their complaint to add an equal protection claim. The District Court denied the motion on the basis of "undue delay." The majority here advances an abbreviated analysis of this issue, which in my view does not comport with the clear precedent in our circuit.

The majority cites to *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984), which provides a thorough explanation of the standard of review for a denial of a motion to amend. *Adams* explained that the mere passage of time will not require a motion to be denied; the delay must be deemed "undue" by either placing a burden on the court of causing prejudice to the opposing party. *Id.* The *Adams* opinion further clarified that questions of delay and bad faith require inquiry into the moving party's motives for not amending the complaint earlier, and questions of prejudice require a focus on the effects on the non-moving party. *Id.*

The majority asserts that when the District Court reviewed the Lindquists' explanation for failing to amend their complaint earlier in the proceedings, the Court was actually following our directive in *Adams* by exploring the Lindquists' motives. I do not think this is so. First, the District Court

considered the Lindquists' explanation for the delay in their motion to amend, but did not actually explore any improper motivations. Second, even if the District Court's brief inquiry into this matter could be considered a focus on motivations, the District Court did not find that Lindquists harbored any bad faith or improper motivations that would justify denial of the motion.

The Lindquists explained that they requested documentation of the Yerkes/Orleans application during discovery, and the Township failed to provide the records. Therefore, the Lindquists did not learn about the preferential treatment afforded to the Yerkes/Orleans application until after discovery when they uncovered these documents themselves from public records. Rather than criticizing the Township for any discovery violation, the District Court blamed the Lindquists for not seeking the public records sooner, and failing to file a motion to compel discovery. It is unmistakable from the District Court's terse order denying the motion that the Court did not actually inquire into the Lindquists' motivation for delay in amending their complaint. Nor did the Court find any improper motivation by them. Rather, the District Court concluded that the Lindquists could have discovered the information sooner, and denied the motion for an apparent lack of diligence.

This court has held that "prejudice to the non-moving party is the touchstone for the denial of an amendment [of a claim]." *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321,

330-31 (1971)). Furthermore, "the obligation of the trial court in its disposition of the motion is to *articulate* the imposition or prejudice caused by the delay, and to balance those concerns against the movant's reason for delay in asserting the motion." *Coventry v. United States Steel Corp.*, 856 F.2d 514, 520 (3d Cir. 1988) (emphasis added). In this case, the District Court did not articulate any prejudice to the Township or burden on the Court. The Court's explanation of actions that the Lindquists could have taken to obtain the evidence sooner does not amount to an articulation of burden or prejudice. Furthermore, any cursory inquiry into the Lindquists' "motivation" does not satisfy the Court's obligation in this matter, particularly when the Court failed to find any bad faith motivation. In my view, the District Court abused its discretion in denying the Lindquists' motion to amend.[8]

IV.

In conclusion, our opinion in *United Artists* brought this circuit in line with most other circuits by adopting the "shocks the conscience" standard for substantive due process

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[8] Furthermore, as a prudential matter, I believe that an equal protection claim would be preferable in this case because it avoids the cumbersome and subjective "shocks the conscience" analysis. As Justice Scalia noted in a concurring opinion in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 200-01 (2003), more specific constitutional claims such as equal protection are preferable to generalized substantive due process claims.

claims in a land-use setting. However, if substantive due process claims are to remain viable under this standard, we must be willing to recognize when a state actor's conduct is so egregious and arbitrary so as to violate the requirements of the Fourteenth Amendment. "Shocks the conscience" is an extremely difficult standard to meet, but it is not insurmountable. I believe that the evidence in this case shows that the Township purposefully obstructed the Lindquists' right to pursue a legitimate use of their land, and consistently and systematically abused its authority and discretion. Not only did the Township violate its own laws, but when the Lindquists sought relief in the state court, the Township frustrated that relief by violating the county Court Order. At this point, I believe that the Township violated the Lindquists' due process rights.

Furthermore, even if reasonable minds may differ regarding what shocks their conscience, I believe that the District Court abused its discretion by denying the Lindquists' motion to amend their claim, and by failing to admit evidence of the Township's more favorable treatment of other land-use applicants. I would reverse the District Court on both of these grounds, remand the case to permit the Lindquists to pursue both equal protection and substantive due process claims, and allow the evidence of the Yerkes/Orleans application.

Regarding the other issues raised on appeal, I would concur with the majority that "shocks the conscience" is the appropriate standard, and that preclusive effect should not be given to the findings of the county court. I agree that the Dis-

trict Court did not abuse its discretion by denying the Township and Board's motion for attorneys' fees.

APPENDIX E –ORDER, DATED SEPTEMBER 19, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-2431

CORA F. LINDQUIST, et al.
v.
BUCKINGHAM TOWNSHIP, et al.
Cora F. Lindquist, Appellant
(E.D. of PA. Civil No. 00-cv-01301)

Present: **SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH and CHERTOFF, *Circuit Judges*.**

Petition by Appellant for an Initial Hearing En Banc.

Anthony Infante
Case Manager 267-299-4916

Response due 9/15/03.

Any Response received will be forwarded promptly.

Appellees' Brief received on 9/3/03.

ORDER

The foregoing petition by appellant for initial hearing en banc is denied.

By the Court,

Circuit Judge

Dated: 19 Sep 2003

APPENDIX F-ORDER, DATED MAY 29, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES O. LINDQUIST, et al.	:	CIVIL ACTION
v.	:	
BUCKINGHAM TOWNSHIP, et al.	:	NO. 00-1301

ORDER

AND NOW, this 29th day of May, 2003, it is hereby ORDERED that the post-trial motion of plaintiffs under Rule 52 (b) of the Federal Rules of Civil Procedure to amend the court's Findings of Fact and Conclusions of Law is DENIED.

The judgment in this non-jury case was entered on April 16, 2003. Rule 52 (b), plaintiffs were required to file any post-trial motion to amend the court's Findings of Fact and Conclusions of Law no later than ten days thereafter, that is, on or before April 30, 2003. At the request of plaintiffs, the court extended the deadline to May 5, 2003, and it was on that date that the motion was filed. It appears that this court did not have the power to enter its April 30, 2003 Order granting the plaintiffs this extension. Rule 6(b) of the Federal Rules of Civil Procedure does not authorize an extension

beyond what is permitted in Rule 52 (b). Under Rule 52 (b), as noted above, a party must file any post-trial motion no later than ten days after entry of judgment. *See Schneider v. Fried,* 320 F.3d 396, 402-03 (3d Cir. 2003); *Cange v. Stotler and Co.,* 913 F.2d 1204, 1212-13 (7th Cir. 1990). This did not occur (even excluding the intervening Saturday and Sunday).

Assuming, however, that unique circumstances existed and the plaintiffs' motion is not out of time, said motion is being denied on the merits. *See Schneider,* 320 F.3d at 403-04. Plaintiffs, for the most part, simply rehash previously proposed findings and prior arguments. The bulk of the proposed additional findings are not material but, to the extent of any of the proposed or amended findings and conclusions would change the outcome, it is rejected. We have considered the entire record and will not alter our findings and conclusions. We reiterate that none of the acts or omissions of the defendants considered individually or as a whole satisfies the applicable shocks-the-conscience standard. *See United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 400-01 (3d Cir. 2003).

BY THE COURT:

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J.

APPENDIX G – FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED APRIL 15, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSLYVANIA

JAMES O. LINDQUIST, et al. — CIVIL ACTION

v.

BUCKINGHAM TOWNSHIP, et al. — NO. 00-1301

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Bartle, J. — April 15, 2003

This is a civil rights action under 42 U.S.C. § 1983 involving a long running dispute over the development of a farm in Buckingham Township, Bucks County, Pennsylvania, part of which was owned by the plaintiffs, James O. and Cora F. Lindquist, and part by James Lindquist along with his children.[1]

Plaintiffs brought the present action against the Township, its Board of Supervisors, individual supervisors Henry W.

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[1] During the pendency of the case, James O. Lindquist died. Cora Lindquist has been substituted as executrix of his estate.

Rowan, Janet D. French and Raymond A. Stepnoski,[2] the Township's Solicitor George M. Bush ("Bush") and its consultants Ernest Knight II ("Knight") and Lynn Froehlich-Bush. Plaintiffs allege that the defendants violated their rights to substantive due process by arbitrarily and irrationally delaying preventing the development of their property. In addition, they contend that the defendants' actions constitute a regulatory taking in violation of the Fifth Amendment.[3] The present action was tried before the court without a jury. The following are the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

I.

The Lindquist farm is located between Route 263 (York Road) and Upper Mountain Road in Buckingham Township and is divided into two separate tax parcels, known as the front parcel and the back parcel. The plaintiffs jointly owned the front parcel consisting of approximately 102 acres adjacent to York Road. Plaintiff James O. Lindquist, along with his children, jointly owned the approximately 147 acre back parcel, which bordered on Upper Mountain Road.

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[2] The Board of Supervisors is responsible for formulating official Township policy.

[3] On April 25, 2001, plaintiff James O. Lindquist and his children filed in this court a nearly identical lawsuit ("Lindquist II"). *See Lindquist, et al. v. Buckingham Township, et al.*, Civ. A. No. 01-2036 (E.D. Pa. 2001). Lindquist II was disposed of on summary judgment in favor of the Township defendants.

The entire 250 acre property falls within the Township's AG-1 zoning district, which permitted the development of a cluster subdivision utilizing transferable development rights ("TDR'S").[4] The Lindquist sought at all relevant times to develop the property as a cluster subdivision using TDR's that would include approximately 216 lots for single family homes.

The plaintiffs' efforts to develop their farm began in earnest in February, 1994 when their representatives first met with the Township and presented the idea. Based in part on the discussions that had occurred, the plaintiffs on July 11, 1994 entered into a Development Services Agreement ("DSA") with SKSM Associates ("SKSM"), a Pennsylvania general partnership with expertise in property development matters.

Pursuant to the DSA, SKSM agreed to act as the plaintiffs' authorized agent and take the steps necessary to negotiate and consummate the sale of the land as building lots, including obtaining permits and approvals, preparing and submitting development plans to the Township, and coordinating site improvements. In this capacity, SKSM was to incur all costs associated with the filing and approval of the land development application. Upon the sale of the property, the Lindquists were to receive the first $5 million of the proceeds and SKSM any amount in excess of $5 million

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[4] A TDR ordinance permits a developer to buy the development rights from a landowner in a sending area and essentially transfer those rights to property being developed in a receiving area.

In the fall of 1994 the Lindquists had further meetings with Township officials.[5] At that time, the Township insisted that any development plan: (1) leave undisturbed approximately 60 acres of the property to help preserve an aesthetically pleasing vista; (2) confine the cluster development to the center and eastern portions of the property so that the development would be scanned from York Road; and (3) utilize TDR's to preserve farmland. These conditions were in addition to those required by the Township's Subdivision and Land Development Ordinance ("SALDO").[6]

In response to the feedback from these meetings, the Lindquists prepared an initial sketch plan outlining the proposed development of the property.[7] Consistent with the Township's desires, the sketch plan preserved the vista on York Road by leaving a portion of the front parcel undis-

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[5] SKSM, as the Lindquists' representative, often met and negotiated with the Township throughout the land development process, as opposed to the plaintiffs or members of the Lindquist family. Because the distinction is not relevant for present purposes, and for simplification, we will speak of whomever met or corresponded with the Township as the Lindquists or the plaintiffs.

[6] Under the SALDO, a party seeking subdivision and land development approval must file first an application and plans for preliminary approval by the Board. In addition, that party also must submit an application for final plan approval. The Board is the only Township entity with authority to grant approvals and denials of these plans.

[7] Submission of a sketch plan is optional under the Township's SALDO.

turbed, compressed the development to the back portion of the property and utilized TDR's. On October 12, 1994 the Lindquists met with the Board to Discuss this plan. Although minutes of the meeting reflect that the Board viewed the plan favorably, the Board further instructed the Lindquists to make several modifications, including one to relocate the entrance road to the development.

The Board and the Township's Planning Commission next met on November 4, 1994 to review jointly the Lindquists' sketch plan. Following that meeting, and in keeping with the Township's direction, the Lindquists retained consultants to perform additional studies and comprehensive testing to assess the feasibility of implementing the Township's preferred sewage treatment solution. This testing continued until October, 1995.

From November, 1994 to October, 1995, the plaintiffs worked cooperatively and productively with the Township, its Planning Commission, and its consultants to facilitate the proposed development of their land. In October, 1995 the Lindquists submitted a revised 1995 sketch plan to the Township that reflected the Township's sewage treatment preferences and responded to additional comments raised by the Board and Planning Commission over the previous year. As before, the revised plan was consistent with the Township's wishes for the development of the property. The plan preserved open space on the front parcel, clustered the development to the back, moved the entrance road, redesigned the road layout and shortened cul-de-sacs.

Based on the 1995 sketch plan and the ongoing discussions between the Lindquists and Township officials, the Lindquists had consultants prepare a set of preliminary plans. Development was to occur in two phases. Phase I was to consist of 111 single-family lots on the front parcel and Phase II was to consist of 110 single-family lots on the back parcel. On March 29, 1996 the Lindquists submitted an application for preliminary subdivision approval of Phase I of the property ("Original Phase I Plan").[8] The plan called for a series of clustered subdivisions in cul-de-sacs as then permitted by SALDO. The layout was consistent with the previously submitted sketch plan.

After receiving the Original Phase I Plan, the Township submitted it to its consultants, Ernest Knight and Lynn Froehlich-Bush, for separate reviews.[9] Knight evaluated the proposal for conformance with the SALDO. Given the nature of the development contemplated by the parties, the Board and Township staff understood that waivers from certain SALDO requirements would be necessary. Froehlich-Bush analyzed the plan for compliance with the local zoning ordi-

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[8] At the time the Phase I Plan was submitted, the Zoning Ordinance permitted the subdivision of the property into a cluster subdivision as a "by-right" use in the AG-1 zoning district without the need for a public hearing or "conditional use" approval by the Board.

[9] The plan also was submitted for review to various other state and local entities, including the County Planning Commission, the County Soil Conservation District, the County Department of Health, and the Pennsylvania Department of Transportation.

nance. She did not identify any zoning deficiencies, although she did note several issues requiring additional clarification from the Lindquists, including open space preservation and the effect of the development on floodplains, wetlands and other natural resources.

On May 1, 1996, the Planning Commission considered the Original Phase I Plan for the first time. At the meeting, the plaintiffs discussed with the Commission the items in Knight's letter and each item that would require a waiver from the SALDO provisions. Neither Knight nor the Planning Commission voiced any opposition to these waivers. Following the meeting, the plaintiffs provided additional studies in response to the Township's comments.

In mid-May, 1996, the spirit of cooperation that had marked the early efforts to develop the Lindquists property experienced a setback. On May 14, 1996, Knight issued a review letter concerning the plan's proposed storm water management facilities that imposed on plaintiffs what they believed to be a "very onerous" and unwarranted requirement with respect to water run-off from the wooded, undeveloped and open space areas of the proposed development. Knight later became "personally offended" when the plaintiffs challenged his assessment in a written letter that also was sent to the Township Manager and the Township Solicitor.

On August 9, 1996 the Lindquists made a formal request for SALDO waivers to the Board. Following a Board meeting on August 28, 1996, the waiver requests remained unresolved. However, Supervisor Stepnoski recommended that

the Lindquists meet with Township staff in an effort to settle the waiver and other outstanding issues.

Pursuant to the Board's direction, the Lindquists met on several occasions with Township staff in September, 1996. Although the Lindquists reached at least a tentative compromise with Township staff concerning the waivers, they learned from a subsequent letter from the Township that the Board did not accept the compromise. Thereafter, on October 23, 1996, the Lindquists sought clarification from the Board and submitted to it two proposed plans, including an Original Phase I Plan and a by-right alternate plan meeting all SALDO provisions. Because the zoning regulations permitted the subdivision of the property into a cluster subdivision as a "by-right" use, the Board would have been required to approve this alternate plan if formally submitted. In response, the Board: (1) directed the Lindquists to proceed with the Original Phase I Plan; (2) consented to grant the waivers necessary to develop the property consistent with Phase I plan; and (3) determined that the plan would be processed under the August 24, 1994 zoning ordinance, as amended December 13, 1995. The Board also required the Lindquists to work with the Township to design a wastewater system that would integrate the proposed development's sewage needs with two other developments proposed within the Township (the "regional sewage system").

Between September, 1996 and June, 1997 the Lindquists spent considerable time and money working with the Township consultants on the regional sewage system. Since they could not proceed with revised Phase I plans until the design

for this system was complete, the plaintiffs were forced to delay the submission of revised Phase I plans. It is important to note, however, that the Lindquists did not supply hydro-geologic testing necessary to determine if the property was feasible for the proposed regional system.[10]

In the meantime, on February 26, 1997 the Board enacted an amendment to SALDO which prohibited cul-de-sac streets within subdivisions. The concept of such a change had arisen years earlier. However, were the amendment to apply to the Lindquists' Original Phase I submission, the plan as proposed would be prohibited. On June 11, 1997 the Board enacted an additional amendment to the Zoning Ordinance which eliminated cluster subdivisions as a "by-right" use in AG-1 zoning districts and provided for cluster subdivisions only as a "conditional use." This was the same day that the Lindquists tendered an application for preliminary subdivision approval of Phase II of the proposed development ("Phase II Plan").

The Township subsequently informed the Lindquists that the Original Phase I plan would be on the agenda for the Board's June 25, 1997 meeting and that the Phase II plan would be reviewed by the Planning Commission at their meeting on July 2, 1997. In response, the Lindquists informed the Township that they intended to submit a revised Phase I Plan within the next couple of weeks and offered, as they had several times during the development process, to

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[10] Hydro-geologic testing ultimately was completed in February, 2001 by the Township's outside water and sewer consultant.

extend the ninety-day statutory review period for the Original Phase I application. Since the revisions to Phase I would also necessitate changes to Phase II, the Lindquists requested that the Township postpone consideration of the Phase II proposal until after submission and review of the revised Phase I Plan. Nonetheless, at its meeting on June 25, 1997 the Board enacted Resolution No. 1533, rejecting the Lindquists' applications for preliminary approval of both the Phase I and Phase II plans ("First Denial Resolution"). As a result of the denial, the Lindquists were subject to the amended zoning ordinances and could not develop their property as a single-family detached cluster development as a "by right" use.

On September 3, 1997 the plaintiffs commenced three separate legal proceedings against the Board in the Court of Common Pleas of Bucks County: (1) a land use appeal from the First Denial Resolution; (2) a mandamus action seeking reversal of the Board's denial of the applications; and (3) a civil rights action under § 1983. The lawsuits ultimately were resolved by a stipulation of settlement signed by the parties on November 12, 1997 and entered as a Court Order on December 12, 1997 ("December 12, 1997 Order"). In accordance with the Order, the Board withdrew the First Denial Resolution and permitted the submission of revised Phase I plans and further revised plans, to be processed and reviewed in accordance with Zoning Ordinance and SALDO

provisions as they existed on December 13, 1995. In addition, the Order provided that the Phase II plans would be processed and reviewed by the Board in accordance with the Zoning Ordinance and SALDO as they existed on June 10, 1997. The Order was silent as to how many times the Lindquists would be permitted to submit revised plans.

On November 18, 1997, shortly after the settlement was reached, the Lindquists filed a revised Phase I subdivision application ("Revised Phase I Plan"). This revised plan also responded to various Township concerns raised in the 1996 review letters from Knight and Froehlich-Bush. Again, Knight and Froehlich-Bush issued written reviews of the Revised Phase I Plan on January 2, 1998, both of which advised the Planning Commission that it should recommend rejection of the revised plan to the Board. The Planning Commission did so on April 1, 1998. At the Board's direction, the Planning Commission had treated the revised plans as a new filing that did not relate back to the earlier submissions. The Lindquists contend that in doing so, the Township was acting in contravention of the November, 1997 stipulation of settlement.

After meeting several times between January and April, 1998 with the Planning Commission, Knight, and Froehlich-Bush to discuss the Revised Phase I Plan, the Lindquists agreed to design further revised plans for Phase I ("Further Revised Phase I Plan"). The Lindquists received additional input and guidance from the Township at a May 13, 1998 Board meeting, at which time the Board agreed to the Lindquists' request to extend the review period for the Further Revised Phase I Plan to July 30, 1998.

On July 20, 1998 the Lindquists advised the Township that the Further Revised Phase I Plan would be forthcoming by the end of July and offered an additional extension of time to the Board for their review beyond the deadline provided by SALDO. Although it had accepted similar extensions in the past, the Board declined the offered extension. Instead, on July 22 the Board enacted Resolution No. 1598, which was meant to reject the Revised Phase I Plan of November 18, 1997 ("Second Denial Resolution").[11] The Lindquists had no prior knowledge that the Board was set to act on the plan on this date. The Board, however, mistakenly denied the Original Phase I Plan dated October 30, 1995. Plaintiffs contend that the Board took this action in bad faith and unrelated to the merits of their application in order to deprive them of the opportunity to submit further revised plans as specifically permitted by the December 12, 1997 Order.

Despite the Board's action of July 22, the Lindquists filed a Further Revised Phase I Plan on July 31, 1998. The Township took possession of the plans but informed the Lindquists that it would not formally accept them and would not treat them as revised plans for the reason that the Second Denial Resolution had denied the subdivision application.

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[11] As Township Solicitor, Bush was responsible for drafting resolutions and advising the Township on their effect. He drafted the denial resolution prior to the July 22, 1998 believing that no revised plans had been submitted. In actuality, a revised submission had been received by the Township on November 18, 1997. The Board passed the Second Denial nonetheless.

Realizing, however, that the Second Denial Resolution denied the wrong plan, the Board soon attempted to correct its error. On August 12, 1998, the Board adopted Resolution No. 1599, which "re-adopted and confirmed" the Second Denial Resolution and amended it to include a denial of the Revised Phase I Plan ("Third Denial Resolution"). This action was motivated, at least in part, by the Township's desire to avoid a possible "deemed approval" of the November, 1997 revised plan, the deadline for review of which passed on July 30, 1998. Specifically, the Third Denial Resolution rejected all plans filed through and including July 22, 1998, accepted the Further Revised Plan submitted on July 31, 1998 and set an August 31, 1998 deadline for review of the Further Revised Plans. The Resolution did not list any reasons for the denial of the Revised Phase I Plan. Rather, it simply incorporated the reasons set forth in the Second Denial Resolution, which repeated verbatim the reasons originally set forth in the First Denial Resolution.

On August 20, 1998, the Lindquists advised the Board that its rejection of the Revised Phase I Plan violated the December, 1997 Order permitting the submission of revised plans. Further, to the extent that the Board was treating the Further Revised Plan as a new plan, the Lindquists asserted that they believed they were entitled to a 90-day statutory review period to include review letters from the Township's consultants.

The Board disagreed. On August 26, 1998, the Board adopted Resolution No. 1600, which rejected the further Revised Phase I Plan as a revised plan ("Fourth Denial Resolu-

tion").[12] This action took place the very same day that the Board received review letters from Knight and Froehlich-Bush. Given the timing, the Lindquists did not have a meaningful opportunity to respond to these review letters. The following day, the Township informed the Lindquists that the July 31, 1998 submission would be accepted and treated as a new plan requiring the payment of new fees and subject to review under the Zoning Ordinance and the SALDO as they existed on that date. As noted above, this meant that the submission would not comply with either because the SALDO no longer permitted cul-de-sacs and the zoning regulations now required "conditional use" approval of cluster subdivisions such as the one proposed.

Pending review of the July 31, 1998 submission under the 1998 ordinances, James and Cora Lindquist filed the following lawsuits in the Court of Common Pleas of Bucks County on September 3, 1998: (1) a mandamus action against the Board alleging that the Revised Phase I Plan should be "deemed approved" under § 508 of the Municipalities Planning Code, Pa. Stat. Ann. tit. 53, § 10508; and (2) a land use appeal of the Second, Third, and Fourth Denial Resolutions. These actions encompassed claims relating to the whole 250 acre tract. On October 28, 1998, while these lawsuits were pending, the Board rejected the Further Revised Phase I Plan in Resolution No. 1610.

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[12] Many of the reasons set forth in the Fourth Denial Resolution for rejecting the plan were identical to the reasons contained in the First and Second Denial Resolutions and had been addressed in the Revised and Further Revised submissions.

Hearings in the mandamus action were held on April 16, 1999, June 7, 1999, and August 16, 1999. Bush represented the Township and the Board. On January 19, 2000 Judge Ward F. Clark issued an opinion and order holding that; (1) the Board of Supervisors failed to take timely action on the Revised Phase I Subdivision Plan submitted November 18, 1997 because it denied the wrong plan in Resolution No. 1598 on July 22, 1998; and (2) the Revised Phase I Subdivision Plan was "deemed approved" upon the failure of the Township to comply with § 508 of the Municipalities Planning Code on or before July 31, 1998. *Lindquist v. Buckingham Township Bd. of Supervisors*, No. 98-6151-23-5 (C.P. Bucks Country, Jan. 19, 2000). Accordingly, the plans were remanded to the Board of Supervisors and the Lindquists continued their efforts to secure final approval of the subdivision plans. The Board appealed the order the following month to the Commonwealth Court of Pennsylvania.

In December, 2000, nine months after commencing the instant action, a settlement was reached between the parties in the state court actions, as well as with the Lindquist children and SKSM, that resolved the state court litigation but permitted this action to proceed in federal court.

By stipulation and order dated April 16, 2001 Township Supervisors Rowan, Stepnoski, and French as well as consultant Froehlich-Bush were dismissed as defendants. In addition, plaintiffs settled all claims against Ernest Knight II

and the Estate of George M. Bush before trial on September 17, 2002.[13]

III.

We turn first to plaintiffs' substantive due process claim. Among other things, they contend that defendants violated their due process rights by: (1) acting in bad faith in reviewing, processing and adjudicating their development plans; and (2) disregarding the December 12, 1997 Order permitting them to submit revised Phase I plans. They seek delay related damages, attorney's fees, and prejudgment interest.

After the trial, our Court of Appeals issued a decision that heightened the bar for plaintiffs challenging municipal land use decisions on substantive due process grounds. *See United Artist Theatre Circuit, Inc. v. Township of Warrington, PA,* 316 F. 3d 392, 401 (3d Cir. 2003), *reh'g en banc denied,* --- F. 3d ---, No. 01-3533, 2003 U.S. App. LEXIS 5936 (3d Cir. Feb. 25, 2003). In order to prevail on a substantive due process claim, plaintiffs must now demonstrate that a defendant's conduct in depriving them of a protected property interest

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[13] Mr. Bush died after the filing of the lawsuit. The settlement did not resolve a cross-claim against his estate by the Township and Board. In the cross-claim, the defendants contend that Bush failed to advance the defense during the state mandamus proceedings that deemed approval was not possible because the ninety-day review period set forth in the Municipalities Planning Code does not apply to a plan remanded from the Court of Common Pleas, as was the Original Phase I application following the November, 1997 stipulation of settlement.

was of such nature as to "shock the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846-48 (1998); *United Artists*, 316 F. 3d at 401. This approach is a departure from prior precedent, which simply required plaintiffs to prove that a defendant acted with an improper motive. *See Woodwind Estates, LTD v. Gretkowski*, 205 F. 3d 118, 124 (3d Cir. 2000); *Bello v. Walker*, 840 F. 2d 1124, 1129 (3d Cir. 1987). Whether the conduct in issue meets the rigorous conscience shocking test will depend on the facts of the particular case. *United Artists*, 316 F. 3d at 399-400. The Court of Appeals made clear, however, that only the "most egregious official conduct'" will rise to the level of a constitutional violation. *Id.* (citing *Lewis*, 523 U.S. at 846).

The Third Circuit has explained that ownership of real property warrants substantive due process protection only under certain circumstances. Although the court also has acknowledged that a protected right can arise where a property owner seeks to subdivide property pursuant to local land use regulations and zoning ordinances, the parties disagree as to how such a right must be established. The plaintiffs contend that they need only establish that they were property owners or that the Township's decisions to deny their applications for subdivision approval impinged on the use and enjoyment of their property and were arbitrarily reached. *See DeBlasio v. Zoning Bd. of Adjustment for the Township of Amwell*, 53 F. 3d 592, 601 (3d Cir. 1995); *see also Levin v. Upper Makefield Twp.* No. 99-CV-5313, 2003 U.S. Dist. Lexis 3213, at *22-23 (E.D. Pa. Feb. 25, 2003) (citations omitted). The defendants, however, assert that a property interest does not warrant due process protection until the

landowner demonstrates that his or her proposed subdivision plan fully complies with the local government's ordinances and regulations. *See Woodwind Estates*, 205 F. 3d at 123.

We need not resolve this dispute. Even assuming that plaintiffs are correct, we conclude that they have failed to meet their burden of establishing a substantive due process violation. The development of the Lindquist farm was an extremely complex project, involving numerous governmental approvals from a variety of public bodies and agencies and requiring compliance with numerous ordinances, regulations, and laws on the local and state level. Not surprisingly, missteps, mistakes, and prolonged delay occurred as a result. It is true that Township and Board decisions contributed to at least some, but certainly not all, of the difficulties that the Lindquists encountered during the protracted subdivision approval process. In addition, the defendants may have been negligent at times and in 1998 may have acted with an improper motive toward the Lindquists and their representatives. However, there is nothing in the facts we have found to prove that the defendants' conduct was so egregious as to be "conscience shocking. " In evaluating the circumstances and reaching this conclusion, we are mindful of the Third Circuit's direction that we are to avoid sitting as a "'zoning board of appeals.'' *United Artists*, 316 F. 3d at 402 (citations omitted). Accordingly, we will enter judgment in favor of the defendants and against the plaintiffs on the plaintiffs' substantive due process claim.

IV.

Plaintiffs also allege that the Township's denial of their development plans violated their rights under the Fifth Amendment, by taking their property. U.S. Const. amend. V. This constitutional right is incorporated into the Fourteenth Amendment and applies to state and local government actions. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 307 n. 1.

Landowners asserting a regulatory takings claim are subject to a strict ripeness requirement. *See id.* at 339. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). As our Court of Appeals has pointed out, "Pennsylvania's Eminent Domain Code provides inverse condemnation procedures through which a landowner may seek just compensation for the taking of property." *Cowell v. Palmer Twp.*, 263 F. 3d 286, 290 (3d Cir. 2001) (citing Pa. Stat. Ann. tit. 26, §§ 1-408, 1-502(e), 1-609.)

For the reasons set forth in our opinion in Lindquist II, we conclude that the plaintiffs' takings claim is not ripe for adjudication. *See Lindquist v. Buckingham Twp.*, No. 01-2036, slip op. at 18 (E.D. Pa. May 3, 2002). We therefore will dismiss it for failure to exhaust appropriate state remedies.[14]

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[14] Plaintiffs also request that we give preclusive effect to the findings of fact and conclusions of law of the state court proceedings.

V.

We turn next to the cross-claims filed in this matter. The Township, the Board, Rowan, French and Stepnoski filed cross-claims against Bush, Froehlich-Bush and Knight. Similarly, Bush and Froehlich-Bush filed cross-claims against the Township, the Board and the individual supervisors. Although plaintiffs agreed by stipulation to dismiss French, Rowan, Stepnoski and Froehlich-Bush, the stipulation does not address the cross-claims. Further, Knight and Lynn Bush, as Executrix of the Estate of George M. Bush, Esquire, remain as parties on the docket. At the very least, the Township and the Board have continued to press their cross-claim against the Estate of George M. Bush. Because we have determined that defendants are entitled to judgment in their favor, Lynn Bush, as the Executrix of the Estate of George M. Bush, Esquire, is entitled to judgment in her favor on the cross-claim of defendants the Township and the Board. Likewise, any defendant with any remaining cross-claim is entitled to judgment in his, her or its favor on such cross-claim.

See Lindquist v. Buckingham Township Bd. of Supervisors, No. 98-6151-23-5 (C.P. Bucks County, Jan. 19, 2000). By order dated November 20, 2001 we granted in part plaintiffs' motion on this very issue. *See Lindquist v. Buckingham Township*, No. 00-1301 (E.D. Pa. Nov. 20, 2001). This decision does not alter the result here. Plaintiffs have presented no evidence or argument as to why this Order should be expanded. Moreover, they fail even to acknowledge the existence of our prior Order. We will not revisit it now.

VI.

Finally, the Township and the Board have moved to re-open the record to elicit additional testimony and evidence regarding the Release and Settlement Agreement entered into by and among the plaintiffs and co-defendant, the Estate of George M. Bush, Esquire. The motion is now moot.

APPENDIX H – ORDER, DATED APRIL 15, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES O. LINDQUIST, et al.	CIVIL ACTION
v.	
BUCKINGHAM TOWNSHIP, et al.	NO. 00-1301

ORDER

AND NOW, this 15th day of April 2003, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

(1) judgment is entered in favor of Buckingham Township and the Board of Supervisors of Buckingham Township and against plaintiffs Cora Lindquist, Executrix of the Estate of James O. Lindquist, and Cora Lindquist in her own right;

(2) judgment is entered in favor of Lynn Bush, Executrix of the Estate of George M. Bush, Esquire, and against defendants Buckingham Township (the "Township"), the Board of Supervisors of Buckingham Township (the "Board"), Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan on the cross-claim filed by the Township, the Board, Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan;

(3) judgment is entered in favor of Buckingham Township, the Board of Supervisors of Buckingham Township,

and against Lynn Froelich-Bush on the cross-claim filed by Lynn Froelich-Bush;

(4) judgment is entered in favor of Buckingham Township, the Board of Supervisors of Buckingham Township, Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan and against Lynn Bush, as Executrix of the Estate of George M. Bush, Esquire, on the cross-claim filed by George M. Bush;

(5) judgment is entered in favor of Lynn Froelich-Bush and against Buckingham Township (the "Township"), the Board of Supervisors of Buckingham Township (the "Board"), Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan on the cross-claim filed by the Township, the Board, Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan;

(6) judgment is entered in favor of Ernest Knight II and against Buckingham Township (" the Township"), the Board of Supervisors of Buckingham Township ("the Board"), Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan on the cross-claim filed by the Township, the Board, Raymond A. Stepnoski, Janet D. French, and Henry W. Rowan; and

(7) the motion of defendant Buckingham Township and the Board of Supervisors of Buckingham Township to re-open the record is DENIED as moot.

BY THE COURT

_____

J.

APPENDIX I – ORDER, DATED JUNE 13, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES O. LINDQUIST, et al. — CIVIL ACTION

v.

BUCKINGHAM TOWNSHIP, et al. — NO. 00-1301

ORDER

AND NOW, this 13th day of June 2002, it is hereby ORDERED that the motion of plaintiffs for leave to amend the complaint to add a cause of action against defendants Buckingham Township and the Board of Supervisors of Buckingham Township ("Township") for violation of the Equal Protection Clause of the Fourteenth Amendment is DENIED.

The present motion was filed on December 21, 2001, 21 months after the filing of the complaint, almost three months after discovery in the case had closed, and at a time when the court had already ruled on summary judgment motions. Plaintiffs attempt to justify the untimeliness of their motion by claiming that recent access to the Township's records relating to its review and processing of other subdivision plans submitted by other similarly situated property owners re-

vealed that Township arbitrarily treated their plans less favorably. We are not persuaded. The records in question are minutes of the Board's meetings. They are public documents to which plaintiffs clearly had access throughout this action. The plaintiffs nonetheless argue that they did not have access to the documents because the Township did not respond to a request for the documents under either the Pennsylvania Right to Know Act or Rule 34 of the Federal Rules of Civil Procedure. It is too late for the plaintiffs to make this argument. The plaintiffs served a request for production of "Copies of full and complete Minutes of the Board of Supervisors' Meetings held between 1994 through 2000" on May 15, 2001. The Township's response to this request was due by June 15, 2001. If the Township did not respond satisfactorily to the request, plaintiffs should have promptly filed a motion to compel production of the documents with this court before the close of discovery. *See* Fed. R Civ. P. 34(b), 37(a). They never filed such a motion. The motion to amend will be denied on the ground of undue delay. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Oran v. Stafford*, 226 F. 3d 275, 291, (3d Cir. 2000).

BY THE COURT:

_____

J.

APPENDIX J – ORDER, DATED NOVEMBER 20, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES O. LINDQUIST, et al. CIVIL ACTION

v.

BUCKINGHAM TOWNSHIP, et al. NO. 00-1301

ORDER

AND NOW, this 20th day of November 2001, it is hereby ORDERED that:

(1) the motion of plaintiffs seeking to have this court give preclusive effect to the opinion, order and findings of fact of the Court of Common Pleas of Buck's County Pennsylvania is GRANTED in part. The following findings of fact will be given preclusive effect as to defendants Buckingham Township and Board of Supervisors of Buckingham Township only:

a. The Board of Supervisors failed to take timely action on the Lindquists' Revised Phase I Subdivision Plan submitted November 18, 1997 because it denied the wrong plan in Resolution No. 1598 on July 22, 1998.

b. The Lindquists' Revised Phase I Subdivision Plan was "deemed approved" upon the failure of the Township to comply with § 508 of the Municipalities Planning

Code, Pa. Stat. Ann tit. 53, § 10508, on or before July 31, 1998.

(2) the motion of plaintiffs for summary judgment is otherwise DENIED because of the existence of genuine issues of material fact.

BY THE COURT:

_____

J.

APPENDIX K – OPINION AND ORDER, DATED JANUARY 19, 2000

IN THE COURT OF COMMON PLEAS
OF BUCKS COUNTY CIVIL DIVISION

JAMES O. LINDQUIST and CORA F. LINDQUIST — No. 98-6151-23-5

vs.

BUCKINGHAM TOWNSHIP
BOARD OF SUPERVISORS

OPINION AND ORDER

I. HISTORY

Plaintiffs are the owners of 249.7 acres on York Road, Buckingham Township, Bucks County, Pennsylvania, where they have lived and farmed for many, many years. They filed a sketch plan in October 1994 to develop a portion of the farm as a cluster subdivision, under the AG-1 district under the then existing zoning ordinance, where the farm is located. After several meetings with the township officials, Plaintiffs, between October 1994 and August 1995, had their representatives conduct feasibility studies and perform comprehensive testing and analysis. On or about January 6, 1996, Plaintiffs submitted to Township an application for preliminary subdivision approval of Phase I of the proposed development, consisting of 111 clustered single-family lots on a portion of the property, identified as "Section A".

Between January 1996 and June 25, 1996, the township's technical consultants issued written reviews of phase I. After a May 1, 1996 meeting with the township planning commission, the commission recommended the granting of a number of waivers from compliance with the Subdivision and Land Development Ordinance (known as SALDO). On August 9, 1996, Plaintiffs' counsel submitted a formal request to the Township for the recommended waivers. These were considered by the township Board of Supervisors on October 23, 1996, when the Board also confirmed that Phase I would be processed under the zoning ordinance amended December 13, 1995.

Under Section 508 of the Municipalities Planning Code, the Board of Supervisors was required to act upon the Phase I application within 90 days. However, Plaintiffs granted the Board five written extensions of the statutory review period through August 30, 1997. The last extension was granted on June 10, 1997.

On June 11, 1997, Plaintiffs submitted their Phase II application to the Township. At that time, the zoning ordinance permitted the proposed development as a "by-right" use without the need for a public hearing or conditional use approval by the Board. However, at their meeting on the evening of June 11, 1997, the Board enacted an amendment to the zoning ordinance, which, *inter alia*:

1. eliminated cluster subdivision as a "by-right" use in the AG-1 district and

2. required cluster subdivision only as a conditional use.

On June 16, 1997, the Township advised Plaintiffs that their Phase II plan would be reviewed by the township planning commission at its July 2, 1997 meeting. On June 23, 1997, the Township advised Plaintiffs that their Phase I plan was on the agenda of the Board's June 25, 1997.

However, at the June 25, 1997 meeting, the Board of Supervisors enacted Resolution No. 1533 which rejected Plaintiffs' application for preliminary approval of both Phase I and Phase II plans. Thereafter, on September 3, 1997, Plaintiffs brought three separate legal proceedings against the Township. These proceedings were resolved on November 12, 1997 when the parties entered into a written Stipulation of Settlement.

This Stipulation was made a Bucks County Court Order on December 12, 1997. That December 12, 1997 Order provided, *inter alia*, that:

> 3. The Board hereby withdraws its Denial Resolution, which withdrawal will become effective upon the approval of this Stipulation and Settlement by the Court.
>
> 4. The Board will permit the Lindquists to submit the Revised Plans for Phase I immediately after this Stipulation is approved by the Court. Upon the submission of the Revised Plan for Phase I and the acceptance thereof by the Board, the Original Phase I subdivision Plans shall be deemed to be withdrawn.
>
> 5. The Board will permit the Lindquists to submit further revised plans to address the comments raised by the Board consultants in their respective reviews of the

Lindquists' Revised Plans for Phase I and Phase II Plans. The Lindquists may delay filing revised plans for Phase II until the Board consultants' comments regarding the revised plans for Phase I have been resolved so that the issues raised with regard to Phase I may be consistently treated in Phase II.

6. The Board will allow the Lindquists to discuss with the Board consultants (at a public meeting if consultants choose) the issues raised by the Board consultants in their respective reviews of the revised Plans for Phase I, Phase II, and any revisions thereof, prior to rendering a decision on the Lindquists' Phase I and/or Phase II Subdivision Applications.

7. The Board will process and review the Revised Plans for Phase I, and any revisions thereto in accordance with the Zoning Ordinance and SALDO, as they existed on December 13, 1995. The Lindquists shall be permitted to incorporate the understandings as set forth in Recital E to this Stipulation.

8. The Board will process and review the Phase II Plans in accordance with the Zoning Ordinance and SALDO, as they existed on June 10, 1997. The Lindquists shall be permitted to incorporate the understandings set forth in Recital E to this stipulation.

Pursuant to the Stipulation, on November 18, 1997, Plaintiffs submitted Revised Phase I Plans to the Board of Supervisors, thereby withdrawing the original Phase I Plans previously submitted. The Revised Plans for Phase I were accompanied by copies of the township's consultants' review

letters and a cover letter by Plaintiffs' counsel summarizing the items submitted as part of the revised plans, indicating how the consultants' reviews had been responded to in the revised Phase I Plans.

On January 2, 1998, the township engineer and the township planner issued separate written reviews of the revised Phase I Plans. Three meetings then took place on January 7, 1998, January 22, 1998 and February 12, 1998 **230 between Plaintiffs' representatives and the township planning commission, township engineer and township planner where the Revised Phase I Plans were reviewed and discussed.

On July 22, 1998, the board of Supervisors adopted Resolution No. 1598, denying Plaintiffs' original Phase I subdivision plan dated October 30, 1995, accompanied by township's consultants' review letters dated April 29, 1996 and May 14, 1996 concerning the original Phase I Plan.

On September 3, 1998, Plaintiffs brought this mandamus action against the Township, alleging Plaintiffs' revised Phase I subdivision application should be "deemed approved" under Section 508 of the Municipalities Planning Code.

Hearings were conducted by the undersigned on April 16, 1999, June 7, 1999, July 7, 1999 and August 16, 1999. At the conclusion of the last hearing, the Court afforded both sides the opportunity to submit requests for findings of fact, conclusions of law and memorandum. These have been received.

Before setting forth its findings, this Court wishes to go on record as concluding that it has found Plaintiffs' witness, Wesley J. Wolf, a licensed civil engineer in Connecticut, New Jersey and Pennsylvania, to be highly qualified in his field. This Court has further found that Mr. Wolf's testimony in this case has been believable and credible. Therefore, upon the basis of Mr. Wolf's credibility and high qualifications, this Court has established many of its findings of fact.

However, in evaluating the qualifications of the Township's witness, Ernest Knight II, this Court finds his qualifications to be not as impressive as those of Mr. Wolf. This Court also found that on numerous occasions in this testimony Mr. Knight was less than candid in his answers to questions, both on direct and cross-examination. Also, this Court found that Mr. Knight was attempting to set forth his views in this case in a light most favorable to the Township, which supplies him with 95 percent of his annual gross income, or $460,000 a year for the last three years.

In making many of its findings, this Court has therefore, on issues in controversy, accepted Mr. Wolf's expert opinions over Mr. Knight's.

By the same token, this Court found the testimony of Lynn Froehlich Bush, the Township planner consultant, to lack quality in her professional opinions and to lack credibility in her testimony. In so concluding, it should not be overlooked that she is married to the solicitor of this township, a position he has held with the municipality over a long period of time.

Mr. Bush's questioning of this witness could be most gently characterized as "leading." In making many of its findings, this court has therefore, on issues in controversy, accepted Mr. Wolf's expert opinions over those expressed by Lynn Froehlich Bush and has likewise accepted his recital of fact matters over those expressed by Lynn Froehlich Bush, where they were in controversy.

That being stated of record, this Court makes the following:

II. FINDINGS OF FACT

1. Plaintiffs, James O. Lindquist and Cora F. Lindquist, his wife (the "Lindquist"), are adult individuals residing on the Lindquist Farm adjacent to Route 263, P.O. Box 146, Buckingham, Pennsylvania 18912.

2. Defendant, the Board of Supervisors of Buckingham Township, is the governing body of the Township of Buckingham, with its principal offices located at 4613 Hughesian Drive, P.O. Box 413, Buckingham, Pennsylvania 18912.

3. The Lindquists are the owners of 249.7 acres of land located between Route 263 and Upper Mountain Road in Buckingham Township, Bucks County, Pennsylvania.

4. At all times material hereto, the Lindquists desired to, and were attempting to develop cluster subdivision consisting of approximately 216 lots on the property.

5. Approximately sixty acres of the property ("front parcel") is located between York Road and the area of the

property on which the Lindquist farmhouse, garage and large barn are located.

6. The front parcel is visually separated from the remainder of the property by the farmhouse, garage, barn and a large stand of mature trees and gently slopes down as it extends from York Road to the farmhouse, garage, barn, and large stand of mature trees.

7. The front parcel, together with the adjacent Coles property and the western portion of the adjacent Nonesuch Farm provides an aesthetically pleasing view from York Road.

8. Successive Board of Supervisors of the Township have desired to protect the view from destruction by development.

9. It is the present Board who has taken an active interest in preserving farmland.

10. The adjacent Coles property and the adjacent Yerkes Nonesuch Farm have both been preserved and the Township proudly admits that it would like to preserve the Lindquist property.

11. If Lindquist could be preserved by the Township there would be a section of over one mile on York Road (Route 263) that would remain farmland.

12. According to the Township's Zoning Ordinance and zoning map, the property is located in the township's AG-1 zoning district, which permits, *inter alia*, the development of

a cluster subdivision, utilizing transferable development rights.

13. The firm of Boucher & James ("Boucher") prepared the development plans for the Lindquists' property.

14. Wesley Wolf, a licensed civil engineer, employed by Boucher prepared the development plans for the proposed development.

15. The proposed development is to consist of two phases.

16. Phase I is to consist of 111 single-family lots and is to be developed first.

17. Phase II is to consist of 110 single-family lots and is to be developed in the future.

18. The development plans for the property were prepared taking into consideration a year-long process of consultations with members of the Buckingham Township Planning Commission ("Planning Commission") wherein the type, location and concentration of the development were discussed.

19. On or about March 29, 1996, the Lindquists submitted to the Board an application for preliminary subdivision approval of Phase I of the property, accompanied by a preliminary subdivision plan, prepared in October 1995, depicting the subdivision of the first phase of the property into 111 clustered single-family lots on a portion of the property.

20. Consistent with industry practice, since the proposed development was to be developed in two phases, the original Phase I subdivision plan also identified in a light dotted line the layout of the roadways and lotting for Phase II.

21. The Township at all times knew that the original Phase I application was only for Phase I of the proposed development.

22. The layout depicted on the Phase I subdivision plan was consistent with the sketch plan previously submitted to the board and the Planning Commission at a series of meetings.

23. The development was positioned well off of York Road to preserve the view that the Board was seeking to preserve.

24. The Township's planning consultant expressly found many aspects of the site layout advantageous to the Township, such as: the large setback from York Road to preserve one of the finest views in the township; clustering the homes together helps to preserve larger areas of open space that are important for protection of natural resources; the large amount of open space preserved as part of the development implements one of the township goals; critical natural features are preserved on this site: wetlands, flood plains and limestone areas as the plan has clustered the development away from these.

25. When the Lindquists submitted the original Phase I subdivision application to the Board, the Zoning Ordinance permitted the subdivision of the property as a cluster subdi-

vision, utilizing transferable development rights, as a "by-right" use in the AG-1 District, without the need for a public hearing or conditional use approval by the Board.

26. When the Lindquists submitted the original Phase I subdivision application to the Board, the Township Subdivision and Land Development Ordinance permitted cul-de-sac streets to be constructed within the proposed development.

27. The Board then amended that Ordinance on February 26, 1997 to prohibit cul-de-sac streets.

28. The original Phase I subdivision plan contained cul-de-sac streets as permitted.

29. The original Phase I subdivision application was reviewed by the Planning Commission at a May 1, 1996 meeting.

30. At that meeting, there was extensive discussion regarding, *inter alia*: (a) the original Phase I subdivision plan's compliance with Subdivision and Land Development Ordinance; (b) a number of waivers from Subdivision and Land Development Ordinance requirements that were requested; and (c) the Planning Commission's agreement to recommend the waivers.

31. After the May 1, 1996 meeting, on August 9, 1996, the Lindquists submitted to the Board a formal request for the waivers that had been recommended by the Township Planning Commission.

32. On September 18, 1996 and on two occasions thereafter, the Lindquists and their representatives met with the Township's staff to discuss, *inter alia*, the requested waivers.

33. At an October 23, 1996 public meeting, the Board, *inter alia*: (a) approved the waivers required to develop the property with the layout depicted on the original Phase I subdivision plan; and (b) determined that the Lindquist application for Phase I would be processed under the Zoning Ordinance dated August 24, 1994, as amended December 13, 1995.

34. Between August 1996 and June 1997, the Lindquists spent substantial time and money, working with Township consultants, developing a sewage treatment and disposal system to service not only the Lindquists' development but two other large communities to be constructed in the Furlong area.

35. The Board was kept advised of the Lindquists efforts during this time period.

36. On June 11, 1997, the Lindquists submitted to the Township an application for preliminary subdivision approval of Phase II of the proposed development together with a subdivision plan.

37. After completion of the plan for the proposed sewer system, by letters dated June 10, 1997 and June 24, 1997, the Lindquists advised the Board of the status of the sewer system for the project and their intent to submit a revised Phase I subdivision plan by the end of June and offered to extend

the statutory review period on the Phase I plan to August 30, 1997.

38. The original Phase I subdivision plan was rejected by the township.

39. On June 25, 1997, the Board enacted Resolution No. 1533 rejecting the Lindquists' applications for preliminary approval of both the Phase I and Phase II subdivision plans.

40. The Board rejected the plans even though it knew that: (a) the Lindquists had offered to extend the statutory review period for the Phase I subdivision application to August 30, 1997; (b) the revised Phase I subdivision plan, incorporating the agreed plans for the Furlong area sewage disposal system, were being prepared and were to be submitted shortly; and (c) the Lindquists' Phase II subdivision application had not yet been reviewed by the Township's consultants or the Planning Commission as required.

41. After the Board denied the subdivision applications, the Lindquists commenced three separate legal proceedings against the Board on September 3, 1997, *i.e.* a civil rights action under 42 U.S.C. §1983, a mandamus action seeking reversal of the Board's denial of the subdivision applications, and a land use appeal from the first denial resolution.

42. The mandamus action sought to compel the Board to: (a) revoke their denial of the Lindquists' Phase II subdivision application and to follow mandatory statutory procedures in the review and processing of the Lindquists' Phase II subdivision application; and (b) revoke their denial of the Lindquists' Phase I and Phase II subdivision applications and

to allow the Lindquists a reasonable opportunity to discuss outstanding issues with Township officials and consultants and to submit revised plans.

43. The legal proceedings commenced by the Lindquists were resolved on November 12, 1997 by a stipulation of settlement signed by the parties and entered as an Order of Court on December 12, 1997.

44. The December 12, 1997 order provided, *inter alia*, that:

> 3. The Board hereby withdraws its Denial Resolution, which withdrawal will become effective upon the approval of this Stipulation and Settlement by the Court.
>
> 4. The Board will permit the Lindquists to submit the Revised Plans for Phase I immediately after this Stipulation is approved by the Court. Upon the submission of the Revised Plan for Phase I and the acceptance thereof by the Board, the Original Phase I Subdivision plans shall be deemed to be withdrawn.
>
> 5. The Board will permit the Lindquists to submit further revised plans to address the comments raised by the Board consultants in their respective reviews of the Lindquists' Revised Plans for Phase I and Phase II Plans. The Lindquists may delay filing revised Plans for Phase II until the Board consultants' comments regarding the revised plans for Phase I have been resolved so that the issues raised with regard to Phase I may be consistently treated in Phase II.

6. The Board will allow the Lindquists to discuss with the Board consultants (at a public meeting if consultant chooses) the issues raised by the Board consultants in their respective reviews of the revised Plans for Phase I, Phase II, and any revisions thereof, prior to rendering a decision on the Lindquists' Phase I and/or Phase II Subdivision Applications.

7. The Board will process and review the Revised Plans for Phase I, and any revisions thereto in accordance with the Zoning Ordinance and SALDO, as they existed on December 13, 1995. The Lindquists shall be permitted to incorporate the understandings as set forth in Recital E to this Stipulation.

8. The Board will process and review the Phase II plans in accordance with the Zoning Ordinance and SALDO, as they existed on June 10, 1997. The Lindquists shall be permitted to incorporate the understandings as set forth in Recital E to this stipulation.

45. The December 12, 1997 Order gave the Lindquists the right to submit revised Phase I subdivision plans to the Board which would be governed by the ordinances in effect on December 13, 1995.

46. The December 12, 1997 Order provided that upon submission by the Lindquists of the revised plans for Phase I, the original Phase I subdivision plans would be deemed withdrawn.

47. The December 12, 1997 Order gave the Lindquists the right to submit further revised plans to address comments raised by the Board's consultants in their reviews of the revised plans for Phase I and Phase II.

48. The December 12, 1997 Order provided that any further revised plans for Phase I which were filed by the Lindquists would also be governed by the ordinances in effect on December 13, 1995.

49. The December 12, 1997 Order permitted the Lindquists to delay filing revised plans for Phase II until the township consultants' comments regarding the revised plans for Phase I had been resolved that the issues raised with regard to Phase I could be consistently treated.

50. On or about November 18, 1997, the Lindquists delivered to the Township the revised Phase I application, which included a revised subdivision plan for Phase I of the property.

51. The Township was not expecting to consider Phase II plans until the issues relating to the Phase I plans were resolved.

52. The revised Phase I subdivision plan was accompanied with a cover letter that summarized the items that were submitted as part of the revised plans, including copies of the Township consultants' review letters of the first submission with annotations by the Lindquists' consultants as to each comment contained in such reviews to indicate how the comments had been responded to in the revised submission.

53. The revised Phase I subdivision plan is dated August 1997 because the Lindquists' consultants were in the process of preparing the revised plans when the Board denied the original Phase I subdivision plan and the Lindquists' consultants proceeded to complete their revisions to the plans in August 1997 in accordance with the township consultants' review letters.

54. The revised Phase I subdivision plan followed the direction received by the Lindquists from the Board as to how to handle certain design aspects of the plan including roadway widths and cul-de-sac streets.

55. On January 2, 1998, the township engineer issued a written review of the revised Phase I subdivision plan.

56. On January 2, 1998, the township planner issued a written review of the revised Phase I subdivision plan.

57. On January 7, 1998, January 22, 1998, and February 12, 1998, the Lindquists' representatives met with the Planning Commission, township engineer and township planner to review and discuss the revised Phase I subdivision plan.

58. As a result of those meetings, the Lindquists agreed that they would submit further revised plans for Phase I.

59. To permit them to complete the revisions to the revised Phase I subdivision plan and to submit such further revised plans to the Board consistent with the terms of the December 12, 1997 Order, the Lindquists requested, and at the Board's meeting on May 13, 1998, the Board agreed, to

extend the review period for the revised Phase I plan to July 31, 1998.

60. The further revised plans for Phase I were being prepared during this time to address the comments received from the township consultants in review letters and meetings and the significant feedback received from the Board at the May 13, 1998 Board meeting.

61. On July 20, 1998 the Lindquists' attorney informed Mark Curfman, the acting township manager, that the further revised plans would be submitted by the end of July and offered an additional extension of time to the Board to allow the Board time to review the revised plans. (See July 20, 1998 letter marked as Exhibit P-22; Pleading Admissions marked as Exhibit P-31 at 10; Contempt Motion and Answer thereto marked as Exhibits P-3 and P-4 at Paragraph 32; Wolf, N.T. Volume I, p. 62, ll. 7-23.)

62. The Board did not accept the Lindquists' offered extension of the review period beyond July 31, 1998.

63. In Buckingham Township, extensions of time offered by a developer must be accepted by the Board before they are considered effective.

64. If the Board does not accept the offered extension, there is no extension of time.

65. On July 22, 1998, the Board adopted Resolution No. 1598.

66. The Board acted on July 22, 1998 so that the Lindquists would not have the opportunity to submit further

revised plans to the Board, even though the December 12, 1997 Order specifically permitted further revised plans to be submitted.

67. Although the subdivision plan then pending before the Board was the revised Phase I subdivision plan submitted on November 18, 1997, the second denial resolution denied the original Phase I subdivision plan dated October 30, 1995.

68. The second denial resolution expressly identified the October 30, 1995 original Phase I subdivision plan as the plan being acted upon.

69. Exhibit P-34 is the planning consultant's April 29, 1996 review of the original Phase I subdivision plan.

70. Exhibit P-36 is the planning consultant's January 2, 1998 review of the revised Phase I subdivision plan.

71. The review letters of township consultants referred to in the second denial resolution are the review letters provided by township consultants to the original Phase I subdivision plans and not of the revised Phase I subdivision plan.

72. The second denial resolution does not mention the revised Phase I subdivision plans.

73. The sixty reasons for denial stated in the second denial resolution are the same as those stated in the first denial resolution.

74. The sixty reasons for denial stated in the second denial resolution pertain to the original Phase I subdivision plan and not to the revised Phase I subdivision plan.

75. The reasons for denial contained in the second denial resolution could not relate to the revised Phase I subdivision plan because each of those comments was addressed in the revised Phase I subdivision plan, when the original Phase I subdivision plan was revised to address the identical comments in the first denial resolution.

76. When the Board adopted the second denial resolution, it denied the wrong plan.

77. The original Phase I subdivision plan and the revised Phase I subdivision plan are not the same.

78. The revised Phase I subdivision plan was changed to address the comments of the township consultants to the original subdivision plan. (See Wolf, N.T. Volume I, p. 56, l. 15 though p. 60, l. 8.) These changes include:

a. a redesign of sections of roadways;

b. eliminated loop road with cul-de-sac at the westerly portion of the site to provide future connection for adjoining Kaplin tract;

c. changes to easterly portion of site along roadway to address certain carbonate comments and alignment comments;

d. changes in lots to accompanying roadway changes;

e. design of a large green area as a sewage lagoon;

f. an increase from three to six detention basins and three smaller water quality basins.

Wolf, N.T. Volume I, p. 56, l. 15 through p. 60, l. 8.

79. The second denial resolution does not take into account the changes contained in the revised Phase I subdivision plan.

80. The Board was informed that the Lindquists were intending to submit a further revised Phase I subdivision plan before the end of July.

81. When the Board attempted to reject the revised Phase I subdivision plan, it knew that the Lindquists "were getting closer to compliance with the Township Ordinances" and wanted to reject the Revised Phase I Subdivision Plan before the Lindquists submitted any further revised plans." (See Pleading Admissions marked as Exhibit P-31, pp. 8-9; Mandamus Answer marked as Exhibit P-2 at Paragraph 29 and Contempt Answer marked as Exhibit P-4 at Paragraph 30 and Rendon Admissions marked as Exhibit P-30.)

> It was agreed by the Planning Commission that further plans should be submitted because the *Lindquists' representatives were getting closer to compliance with the Township Ordinances.* The last meeting was February 12, 1998."
>
> Exhibit P-2, paragraph 29. (Emphasis added)
>
> It was agreed by the planning commission that further plans should be submitted because *the Opportunists were getting closer to compliance with the*

Township Ordinances. The last meeting was February 12, 1998, but the revised plans were not filed until July 31, 1998."

Exhibit P-4, Paragraph 29. (emphasis added)

Q. And the board adopted Resolution 1598 on July 22nd, which denied and rejected the Lindquists' revised Phase I application didn't it?

A. Yes.

Q. So they acted--the Board of Supervisors acted to deny the revised subdivision application before the Lindquists had an opportunity to submit further plans to the Township, even though the stipulation specifically permitted further revised plans to be submitted, right?

A. Yes.

Rendon Admissions, Exhibit P-30, pp. 55-56.

82. The further revised subdivision plan for Phase I was completed on July 31, 1998.

83. On July 31, 1998, in accordance with the December 12, 1997 Order and within the May 13, 1998 approved extension, the Lindquists attempted to submit the further revised subdivision plan for Phase I to the Board to address the comments raised by the township engineer and the township planner in their respective reviews of the revised phase I subdivision plan, the resolution of certain issues discussed at

the January 7, 1998, January 22, 1998 and February 12, 1998 meetings with the Planning Commission.

84. Township officials took the further revised Phase I subdivision plan into their possession but stated that they would not formally accept them.

85. Thereafter, the Township refused to accept the further revised Phase I plan as "revised plan" on the purported basis that the subdivision application had been denied by the second denial resolution. Rendon Admissions, Exhibit P-30, pp. 64-66.

86. By letter dated August 27, 1998, the Township stated that the Board would treat the further revised Phase I subdivision plan as a new subdivision application, which would be governed by the zoning amendment and the Subdivision and Land Development Ordinance amendment and not the ordinance in effect on December 13, 1995, as provided for in the December 12, 1997 Order.

87. The Township sought to charge the Lindquists another $9,300.00 as fees for the purported new submission.

88. The significance of requiring the plans to be submitted as new plans, rather than revised plans, was that as new plans, they would have to comply with current ordinances.

89. The Board knew that the further revised plan would not comply with the zoning amendment and the Subdivision and Land Development Ordinance amendment because (a) the Subdivision and Land Development Ordinance amendment prohibited cul-de-sac streets and (b) the road layout, for

which the Lindquists had previously received approval from the Board, did not comply with the township engineers' interpretation of the road design allowed by the Subdivision and Land Development Ordinance amendment.

90. On August 12, 1998, the Board adopted Resolution 1599 which purported to re-adopt and confirm the second denial resolution, and to retroactively supplement the second denial resolution to include the rejection of the revised Phase I application.

91. The third denial resolution was adopted because the second denial resolution had rejected the wrong plan.

92. At the time the Board enacted the third denial resolution, the statutory review period for the revised Phase I subdivision plan had expired on July 31, 1998.

93. The third denial resolution also provided that the further revised plans submitted by the Lindquists on July 31, 1998 would be treated as a "revised plan" and that the review period would expire on August 31, 1998.

94. The third denial resolution did not list in the resolution the reasons for the denial of the revised Phase I subdivision plan.

95. On August 26, 1998, the Board adopted Resolution 1600 to reject the further revised Phase I subdivision plan as a "revised plan" and to accept the further revised Phase I subdivision plan as a new subdivision application to be reviewed under the Zoning Ordinance and Subdivision and

Land Development Ordinance as they existed on July 31, 1998.

96. The fourth denial resolution was adopted only two weeks after the Board reversed its prior decision to allow the July 31, 1998 plans to be processed as revised plans.

97. The first 57 reasons for the denial as identified in the fourth denial resolution were the same first 57 reasons provided in the first and second denial resolutions, all of which had already been addressed by the Lindquists in the revised and further revised subdivision plans.

98. The effect of rejecting the July 31, 1998 plans as revised plans and allowing them to be processed as a new plan submission was that the plans would have to be reviewed under ordinances adopted and in effect on July 31, 1998 rather than December 13, 1995.

99. The Township admitted that the effect of rejecting the July 31, 1998 plans as revised plans and allowing them to be processed as a new plan submission was that the plans would have to be reviewed under ordinances adopted and in effect on July 31, 1998 rather than December 13, 1995.

100. The plans, if considered under the ordinances in effect as of July 31, 1998, could not comply because two critical modifications had taken place to the ordinance *i.e.* cul-de-sacs were no longer permitted and the development would not require conditional use approval.

101. It is standard practice and requirement of the MPC for new submissions to be reviewed by the Planning Commission.

102. It is standard practice for the Planning Commission to review new submissions before formal resolution is made with respect to the plans.

103. The Board enacted the fourth denial resolution, ignoring standard practice and the MPC, rejected the further revised plans without providing the Lindquists with any reviews from the Planning Commission or township consultants.

104. Lynn Froehlich Bush is a consultant to municipalities on planning and zoning issues.

105. Bush was a consultant for the Township on the Lindquist development plans for zoning issues.

106. In an attempt to convince the Court that the second denial resolution applied to the revised Phase I subdivision plan, Bush testified that even though the comments attributable to her in the first denial resolution are identical to those comments attributable to her in the second denial resolution, i.e., paragraphs 2, 3, 4 and 5, these comments still related to the revised Phase I subdivision plan.

107. Bush admitted that the revised Phase I subdivision plan contains the additional information that was requested in her April 29, 1996 review letter of the original Phase I subdivision plan.

Q. Now, this letter is four pages long, and it has 16 comments, right?

A. I believe you're right, uh-huh.

Q. And your prior review, Exhibit 34, was two pages and has seven comments, doesn't it?

A. It does, because when the second review was--when the second plan was submitted, we got some of the information that I asked for in phase one. In the first letter I said I couldn't do a complete review, because we didn't have information on wetlands or tree removal or flood plains, but we needed it, so by the time the second plan was submitted, I was able to comment on those things.

Q. So you were able to comment on all of that with regard to the second plan?

A. As best I could.

Bush, N.T. Volume II, p. 98, ll. 10-25.

108. In addition to the submittal that was made on November 21, 1997 with the revised Phase I subdivision plan, Bush received additional information from the Lindquists between November 21, 1997 and July 22, 1998.

Q. Now, in addition to the submittal that we made on November 21, you were given additional information between November 21, 1997, and July 22, 1998, when resolution 1598 rejecting the second plan was adopted, weren't you?

A. I've got several--received several letters.

Bush, N.T. Volume II, p. 99, ll. 1-6.

109. Paragraph 2 of the second denial resolution provides that "it is not possible to confirm the adequacy of the number of lots without additional calculations concerning the net buildable site area. These calculations must be presented in accordance with the formula in Article 5, Section 502 of the zoning ordinance. Applicant has also failed to designate whether option A or option B is being used for the B2 cluster development." However, Bush acknowledged that the revised Phase I subdivision submittal used option B. Bush admitted that the Lindquists submitted site capacity calculations. (See Bush, N.T. Volume II, p. 108, l. 12 through p. 110, l. 7.)

110. There were no deficiencies in the site capacity calculations. (See Wolf, N.T. volume IV, p. 71, l. 4 through p. 76, l. 24.)

111. Bush's testimony that the comments in paragraph 2 still related to the revised Phase I subdivision plan is not credible since Bush's comments regarding open space requirements as contained in her January 2, 1998 review letter of the revised Phase I subdivision plan are different than those contained in her April 29, 1996 review letter.

Q. Now, let's--just so His Honor is clear, what I'm attempting to do, Exhibit 45--I'm sorry, Exhibit 36 is Mrs. Bush's comments on our November 1997 submittal. Exhibit 34 is her comments with regard to the earlier plan, the 1995 plan. We've already

established, Mrs. Bush, that comment number 2 in resolution 1598 is virtually identical to comment number 2 in your April 29, 1996, letter, correct?

A. I agreed that the content was similar.

Q. Now, when we get to your review of the 1997 plan, in exhibit 36 you have a different comment with regard to open space, don't you?

A. I have a lot of--

Q. I'm sorry, I said the wrong word. With regard to site capacity calculations. That's included in paragraph 8 on page 3.

A. Yes.

Q. Right?

A. Uh-huh.

Bush, N.T. Volume II, p. 111, l. 14 through p. 112, l. 8.

112. The comments contained in Paragraph 2 of the second denial resolution were addressed in the revised Phase I subdivision plan and, therefore, could not still relate to the revised Phase I subdivision plan. (See Wolf, N.T. Volume IV, p. 62, l. 1 through p. 64, l. 25.)

113. Paragraph 3 in the second denial resolution provides: "Inadequate information has been provided for the Township to determine whether the open space requirements have been met. See Zoning Ordinance Section 502." Paragraph 3 of the second denial resolution contains Bush's comments to the

original Phase I subdivision plan as contained in her review letter of April 29, 1996.

Q. Let's go on to comment number 3 in the resolution. Comment number 3 says, "Inadequate information has been provided for the township to determine whether the open space requirements have been met. See zoning ordinance section 502." Right? Did I read it accurately?

A. Yes, you did.

Q. Now, if we go to your April of 1996 letter, that mimics paragraph 3 of that letter, right?

A. It may well relate. It's a continuation of an ongoing problem of not being able to understand what open space is being proposed and whether the ordinance has been met.

MR. KAPLIN: Your Honor, would you direct the witness to answer my questions and not make speeches?

THE COURT: That one was okay.

BY MR. KAPLIN:

Q. So, we're talking now about open space in paragraph 3 of the resolution, and we're talking about open space in paragraph 3 in your letter of April 29, 1996, aren't we?

A. I believe that's what your question was, yes.

Q. Let me say that in another way. This is the set of--that were marked as Exhibit 19 at our prior hearing. This is the August 8, 1997 set of subdivision plans, 34 sheets that were actually submitted to the township on November 21. Now, I don't know whether you--I'm sure you can't see it. I'm having enough trouble seeing it. But your comments with regard to open space--or, excuse me, the comments with regard to open space in resolution 1598 indicate that sufficient information hasn't been given to substantiate the amount of open space that has been provided, right?

A. I want to refer to the resolution.

Q. Well, let me read it. Specifically, "Inadequate information has been provided for the township to determine whether the open space requirements have been met."

A. Yes.

Q. Okay. And that's similar, if not identical, to your comment back in 1996 with regard to the original plan, right?

A. The comment still applies.

Bush, N.T. Volume II, p. 113, ll. 1-23; p. 114, l. 11 through p. 115, l. 7.

114. Note 40 and 41 on the revised Phase I subdivision plan (Exhibit P-19) provides information on open space and page 2 of 34 designates the open space area.

Q. Now Miss--Mrs. Bush also testified with respect to Comment No. 3. That it related to the November 9--to the plans submitted in November 1997. That comment reads: "Inadequate information has been provided for the Township to determine whether the open space requirements have been met. See Zoning Ordinance Section 502." Now, how is this comment addressed the plan?

A. Well, you have to actually refer to two--couple of different plan sheets. The record plans which comprise of a total of five sheets, which would be Sheets 2 through 6--actually, on Sheet 2 of 34 of the record plan we provided a detailed area summary of total lots, roadways, cul-de-sacs, as well as open space areas, and over the left side of the plan we had specific lot area information. And then on the cover sheet there was a Note 40 dealing with open space.

I think we went through this previously that this is a cluster subdivision and 50 percent of the base site area which would exclude the right-of-way of Upper Mountain Road or York Road were to remain as open space. In addition, under the Used B2, Option B with TDRs, 80 percent of this, 50 percent had to be continuous.

So, for example, if I had a 200-acre tract, 100 acres of base area of a 100 acres would have to be open space and 88 acres of that or 80 of 100 had to be contiguous.

So, if you look at note 40, it says: "The minimum required 50 percent open space area of 124.56 acres for the overall site is comprised of open space A," which is here, and clearly represented on several plan sheets as open space A. And if you look at the area summary, it says 84.57 acres. Okay? So that's 84.57 acres.

"And portions of open Space B, north and south of Cul-De-Sacs A and B." Open Space B is here. So we included this portion north. These are Cul-De-Sacs A and B, portions north and south. And what we did as in all the Open Space areas was exclude detention basins, which are not permitted as open space and recreation area. So in case of open space B we had a total of 29.2 acres.

And then there were several other pieces that were included--Open Space E, which is here; Open Space I in the northeasterly, very easterly portion of the site--all excluding detention basins, for a total of 130.1 acres. So we were required to have 124.56 acres. We had 130.1--well in excess. And that was based at the time the plans were submitted, was based on open space analysis for the entire site.

The second--excuse me for a minute.

The second pertains to 80 percent of the open space being contiguous. Our phase line ended here, so essentially the shaded area is Phase I. And Note 41 says: "The minimum required 80 percent con-

> tinuous open space of 99.7 acres"--so 80 percent of 124.56 would be 99.7—"for the overall site is comprised of Open Space Area A"--that we previously talked about--"84.75 acres, and the portion of Open Space B south of Cul-De-Sac A."
>
> And this is for road clear. This would be the contiguous piece of open space and analyzing the site as one big development."

Wolf, N.T. volume IV, p. 65, l. 1 through p. 67, l. 20.

115. Bush admitted that Exhibit P-45 is a chart she received from the Lindquists' engineer setting forth a compilation of the open space requirements for the Lindquists' site in accordance with the ordinance.

> Q. That's part of Exhibit 45. Now, this chart as I understand it is a compilation of the open space requirements for this site in accordance with the ordinance, and it's broken down into basically three different ways. It treats the site on an overall basis, the whole 249 acres, and calculates the open space that would be required under the ordinance on an overall composite basis. It then, at your request, breaks down the open space calculations on a phase-by-phase basis, doesn't it?
>
> A. The chart does show that information, yes."

Bush, N.T. Volume II, p. 99, l. 18 through p. 101, l. 3.

116. Exhibit P-45 shows the method of calculation of the required open space either on an overall basis or on a phase-

by-phase basis.

> Q. I just merely asked you whether this broke down the amount of open space that is required on a phase-by-phase basis. That's just a number, isn't it?
>
> A. Yes. That's what the titles of this chart show, that's correct."

Bush, N.T. Volume II, p. 101, ll. 18-22.

117. Bush acknowledged that at a subsequent planning commission meeting, several one-sheet boards showing the open space areas were presented.

> Q. Excuse me one second. And the truth is, Mrs. Bush, that you were shown a plan at a Planning Commission meeting, and Wes Wolf showed you in detail where all of those separate areas of open space were.
>
> A. It was--
>
> Q. Isn't that accurate?
>
> A. I honestly don't recall whether that's accurate or not. You submitted a couple of one-sheet boards that were provided to the Planning Commission but never made a formal submission for me to review or for anyone in the township to review. I can't say whether or not this was part of a Planning Commission exhibit or not. It may very well. But there was no "formal submission" made that would al

low me to understand where open space A-1 and A-2 are.

Q. By "formal submission," you mean a re-submission of another plan, correct?

A. Or even a piece of--

Q. Could you answer yes or no, please?

A. Yes, yes.

Bush, N.T. Volume II, p. 102, l. 23 through p. 103, l. 17.

118. The open space proposed on the revised Phase I subdivision plan meets the open space requirements of the Zoning Ordinance for Option B-2 with TDRs. (See Wolf, N.T. Volume IV, p. 77, l. 17 through p.79, l. 25.)

119. In Section 502.A.2 of the Zoning Ordinance, the minimum open space requirement for a B-2 cluster is 50% of the base site area.

Q. Now I'm at a loss, because I don't have the same ordinance that you have, but let's see about that for a moment. In the B2 cluster, this is in section 502.A.2 of the ordinance, correct, the minimum open space requirement?

A. For a B2 cluster?

Q. Yes.

A. Yes, I see that.

Q. And the minimum open space requirement is 50 percent of the base site area, isn't it?

A. Yes, it is.

Bush, N.T. Volume II, p. 119, ll. 9-19.

120. The document entitled "Lindquist Farm Site Capacity Computations" which was marked as part of Exhibit P-33 and submitted with the revised Phase I subdivision plan provides that the base site area is 249 acres on the overall site, and, therefore 50 percent for open space would be the 124.55 acres.

Q. Now, in calculating the base site area, that was done on this document entitled, "Lindquist farm site capacity computations," wasn't it?

A. Yes.

Q. And basically comes down to that the base site area is 249 acres on the overall site, and, therefore, 50 percent for open space would be the 124.55 acres that you referred to.

A. Yes.

Q. And that included in that are flood plains and flood plain soils and wetlands and steep slopes and forests and all of those items. They all go into the calculation, don't they?

A. Yes.

Bush, N.T. Volume II, p. 120, l. 21 through p. 121, l. 9.

121. Paragraph 4 of the second denial resolution provides: "The Township is unable to determine whether basic area and dimensional requirements are met because of the 'sketch' nature of a portion of the plan." Bush admitted that this comment refers to Phase II.

> Q. Thank you. Now, coming back to the resolution, paragraph 4 states, "The township is unable to determine whether basic area and dimensional requirements are met because of the 'sketch' nature of a portion of the plan." I read that accurately, didn't I?
>
> A. Yes.
>
> Q. And that correlates with or is similar to--excuse me one second. In your January 2, 1998, review of the plan--I'm sorry, of the plan that's submitted in 1997, you said that you were only reviewing phase one, correct?
>
> A. As I said earlier, I said that because I was--I wanted to avoid, try to avoid some confusion about what was going on with the second phase.
>
> Q. This comment refers to phase two, doesn't it?
>
> A. Sure, it does, but we're—

Bush, N.T. Volume II, p. 122, l. 13 through p. 123, l. 4.

122. Bush's testimony that she was confused as to whether the revised Phase I subdivision plan included Phase II is not credible in that Bush's January 2, 1998 letter expressly rec

ognized that "information on Phase II has not been provided, I have reviewed only Phase I.

Bush, N.T. volume II, p. 96, l. 24 through p. 98, l. 2.)

123. Despite Bush's claims that she was confused whether the Lindquists' submissions included both phases, Bush admitted that the December 12, 1997 order differentiated between Phase I and Phase II of the proposed development and that separate plans were to be submitted for those phases.

> Q. So this stipulation differentiates between phase one and phase two and the plans for two different sections, right?
>
> A. It does, I believe because that's how your plans were titled, your plan was titled.
>
> Q. Could you just give me a yes or no answer, not-
>
> THE COURT: I interpret her answer as yes."

Bush, N.T. Volume II, p. 83, ll. 1-7.

124. Paragraph 5 of the second denial resolution provides: "Applicant has failed to provide sufficient information for the township to review resource disturbance for forests, slopes, flood plains, wetlands and other resources in accordance with the zoning ordinance Section 3101.B." This comment is identical to the comment contained in the April 29, 1996 review letter of the original Phase I subdivision plan. (See Bush, N.T. volume II, p. 125, ll. 1-23.)

125. However, the comment 5 is addressed in the revised Phase I subdivision plan insofar as the original plans were

revised to provide information as to disturbance of forest land, slope, flood plain areas, flood plain soils, wetlands and limestone areas. (See Wolf, N.T. Volume IV, p. 80, l. 1 through p. 81, l. 13; the revised Phase I subdivision plan, exhibit P-19 and P-19A.)

126. Bush admitted that the original Phase I plan did not exceed the 20 percent limit on intrusion into forest areas. (See Bush, N.T. Volume II, p. 127, ll. 8-22, p. 129, l. 2 through p. 130, l. 11; Original Phase I Subdivision Plan, Exhibit P-10.)

127. Bush admitted that the revised Phase I subdivision plan provides information on disturbed areas.

Q. You have T-3 there--T-2 there?

A. Yes.

Q. Now, with regard to the 1997 plan, the last sheet talks about the disturbed areas, doesn't it?

A. Yes.

Q. And this was taken right from the 1997 plans, wasn't it?

A. Yes, it was.

Q. And it says forest--it says resource category on the left, doesn't it?

A. Yes.

Q. It says forest, total number of acres 79.9, doesn't it?

A. Yes.

Q. Disturbed, 17.0, right?

A. Yes.

Q. Allowable disturbance 22.2?

A. Yes.

Q. Right?

A. Uh-huh.

Q. So it gives you all of that information, doesn't it?

A. That's one part of the information that you gave us, yes.

Bush, N.T. Volume II, p. 126, l. 9 through p. 127, l. 7.

128. In fact, the Lindquists advised Bush before the second denial resolution was entered that there was to be no disturbance of wetlands in Phase I of the development. (Wolf, N.T. volume IV, p. 81, l. 14 through p. 85, l. 5; January 19, 1998 letter, Exhibit P-45; January 20, 1998 letter, Exhibit P-41.)

129. Further, the Lindquists informed Bush before the second denial resolution was enacted that there would be no disturbance of the floodway. (See Wolf, N.T. Volume IV, p. 85, l. 2 through p. 89, l. 7; February 27, 1998 letter, Exhibit P-43.)

130. Ernest Knight II is Buckingham Township's Engineer.

131. Ninety-five percent of Knight's work is for municipal clients and at the present time Buckingham Township is his only municipal client. His average annual gross income from the Township for the last three years is $460,000.00 a year. (N.T. Volume III, p. 7, ll. 10-13 and Court's Exhibit I.) (See also, N.T. Volume III, p. 31, l. 20 through p. 34, l. 20.)

132. Knight reviewed the Lindquists' original Phase I subdivision plan filed March 29, 1996. (See Knight, N.T. Volume III, p. 8, ll. 4-7.)

> Q. And so of course, you would have reviewed the Lindquist plan which was originally filed in 1996, did you not?
>
> A. Yes.

133. Exhibits P-35 and T-4 are Knight's January 7, 1998 [sic] reviews of the revised phase I subdivision plan. (See Knight, N.T. Volume III, p. 17, l. 23 through p. 18, l. 12, p. 20, ll. 12-19.)

> Q. Do you recognize P-35?
>
> A. Yes, I do. It's a review letter that Knight Engineering, our firm prepared.
>
> THE COURT: Prepared by you?
>
> THE WITNESS: It's prepared under my direction.
>
> THE COURT: Does it bear your signature?

WITNESS: Yes, it does.

MR. KAPLIN: This is the same as--I'm sorry.

A. This is a review letter that was prepared for the November 21, 1997 Lindquist Planning Commission for Phase One of the project. It was a letter addressed to Buckingham Township Planning Commission.

MR. KAPLIN: May I suggest that Exhibit 35, Plaintiff's Exhibit 35 is the same letter and I believe that we have included the sketch, we may not need to do that.

THE COURT: I have no problem with duplicity in this regard. So Mr. Bush, that will be his exhibit even though it may be duplicative of P. 35.

Knight, N.T. Volume III, p. 17, l. 23 through p. 18, l. 12; p. 20, ll. 12-19.

134. Paragraph 59 of the second denial resolution refers to a Knight review letter dated June 25, 1996 which was a review of the original Phase I subdivision plan prepared in 1995 and submitted in 1996.

Q. I call your attention to Paragraph 59 of the resolution. It's a fact, is it not, that the paragraph refers to a review letter by Knight Engineering, date June 25, 1996, doesn't it?

A. Yes, it does.

> Q. And that June 25, 1996 review letter was a review of the plan filed, the original plan filed in 1996 in this matter; isn't it? It's a plan prepared in 1995, submitted in 1996?
>
> A. Correct.

Knight, N.T. Volume III, p. 43, ll. 6-15.

135. There is no reference in the second denial resolution to Knight's review letter dated January 2, 1998 which was a review of the revised Phase I subdivision submitted in November 1997. (See Second Denial Resolution, Exhibit P-23.)

136. In an attempt to convince the Court that the second denial resolution applied to the revised Phase I subdivision plan, Knight testified that 27 of the 60 paragraphs contained in the second denial resolution still applied to the revised Phase I subdivision plan.

> Q. Following that and as I stated in court at the last hearing, you determined that a certain number of the paragraphs contained within 1598 still applied to that November plan; did you not?
>
> A. Yes, I did.
>
> Q. Did I tell you that Mr. Kaplin had asked that we provide the list of the paragraph numbers to him?
>
> A. Yes, you did.
>
> Q. And did you write a letter which I am now marking T-10, sending that list to me and to Mr. Kaplin on July 16 of this year?

A. That is correct.

Q. All right. Now looking at it a moment, you have mentioned there are 27 different paragraphs; have you not?

A. I don't know the exact count, but looks like, 27, yes.

Knight, N.T. Volume III, p. 25, ll. 10-22; p. 26, ll. 14-18.

137. Although the second denial resolution listed 60 purported deficiencies, Knight identified only 27 of the 60 as purportedly still relevant to the revised phase I subdivision plan submitted in 1997, i.e. paragraphs 1, 7, 14, 16-18, 20-23, 25-27, 31, 32, 34, 35, 37, 38, 42, 46, 48, 51, 52, 54, 55, 57.

Q. Now resolution 1598, projecting [sic] the 1997 plans contains 60 separate items; does it not?

A. Yes, it does.

Q. It's your testimony that 27 of these 60 items are still relevant or outstanding with regard to the 1997 plans?

A. That is correct.

Q. You were here when Mrs. Bush testified, weren't you?

A. Yes, I was.

Q. If I remember correctly, she said that there were five of the 60 items contained in 1598 still outstanding; is that your recollection?

MR. BUSH: I object to that characterization, her testimony was talking about the zoning items.

THE COURT: Was she?

MR. KAPLIN: Was talking about five of the 60 items that were included; that was my understanding.

THE COURT: Hold it. You were here at that time?

THE WITNESS: Yes, I was.

THE COURT: Do you recall her testifying about this?

THE WITNESS: Yes. And my recollection is that Ms. Bush was referring to her avenue of expertise, meaning zoning. That there were five zoning issues that were unanswered. I'm referring to subdivision and land development issues that are still open.

BY MR. KAPLIN:

Q. So if we put together the two of your areas of expertise, we have 32 items out of 60?

A. I don't know if there are other expertise in there that--

Q. Talking about your expertise and Mrs. Bush?

A. Yes.

Q. So there are 27 and five, 32 items between the two of you that you say are still outstanding, meaning they still apply to the 1997 plan, correct?

A. That is correct.

Knight, N.T. Volume III, p. 36, l. 24 through p. 38, l. 17.

Per your request, we have reviewed Buckingham Township Resolution No. 1598 to ascertain which items are still open (have not been addressed) with regard to the Lindquist Development plans referenced within that resolution.

The following item numbers relating to Knight Engineering's review are still open issues: 1, 7, 14, 16, 17, 18, 20, 21, 22, 23, 25, 26, 27, 31, 32, 34, 35, 37, 38, 42, 46, 48, 51, 52, 54, 55, 57."

Exhibit T-10.

138. Knight admitted that there are deficiencies listed in the second denial resolution that had already been addressed in the revised phase I subdivision plan and did not apply to the revised phase I subdivision plan. (See Knight, N.T. Volume III, p. 40, l. 7 through p. 41, l. 21.)

139. Paragraph 1 of the second denial resolution provides that "pursuant to the Bucks County Conservation letter dated April 26, 1996, the plans are inadequate for erosion and sediment control purposes and do not meet the requirements of the Pennsylvania DER." Paragraph 1 of the second denial

resolution cannot relate to the revised phase I subdivision plan because, as Knight admitted, the April 26, 1996 letter referred to in paragraph 1 predates the submission of the revised Phase I subdivision plan. (See Knight, N.T. Volume III, p. 44, l. 21 through p. 45, l. 15.)

140. Paragraph 7 of the second denial resolution provides that "all existing features within 500 feet of the site must be shown on the plan." Knight acknowledged that a waiver was required from this SALDO provision and was discussed at a May 1, 1996 Planning Commission meeting at which time Mr. Stein, the architect for the proposed development had asked "if a aerial photograph could be provided" and Mr. Knight responded, "this would be permitted, however, if further information is needed it is to be provided." (See Knight, N.T. Volume III, p. 50, l. 2 through p. 51, l. 8; Exhibit P-11, Exhibit P-13.)

141. Paragraph 14 of the second denial resolution provides "easements must be provided for all storm water swales common to more than two lots, such as the swales in the rear of lots B-54 and B-57." Knight acknowledged that note 21 on the revised subdivision plan marked as Exhibit P-19 provides that information as to easements for swales of more than two lots shall be provided on and/or in conjunction with the Final Plan, address paragraph 14 of the resolution. (See Knight, N.T. Volume III, p. 52, l. 8 through p. 53, l. 19.)

142. Knight acknowledged that if preliminary approval is made subject to the satisfaction of a list of items such as the item that easements be put on the plan between the prelimi

nary and final, his concern that the Township's interest to make sure that everything is on the plan that should be on the plan is taken care of.

> Q. And if the preliminary approval is made subject to the satisfaction of a list of items such as the item that the easements be put on the plan between preliminary and final, your concern is taken care of; isn't it?
>
> A. Quite right.
>
> Q. Can you answer the question?
>
> A. Yes, if acceptable to the township in that regard.

Knight, N.T. Volume III, p. 54, l. 21 through p. 55, l. 4.

143. Paragraph 16 of the second denial resolution states "a drainage easement must be shown for the existing water course (Watson Creek) and must include the 100-year flood plain." Knight acknowledged that note 21B indicating that "drainage easements shall be provided for Watson Creek" addresses the issue and that the existing plans show the flood plain. (See Knight, N.T. Volume III, p. 55, l. 5 through p. 56, l. 11.)

144. Paragraph 17 of the second denial resolution states "all easements shall be monumented on one side at the beginning, end, and all changes in direction." Knight acknowledged that note 21C of the revised phase I subdivision plan submitted in November 1997, which provides "metes and bounds descriptions with monuments and legal descriptions shall be provided for all easements," addresses this issue.

(See Knight, N.T. Volume III, p. 56, l. 12 through p. 58, l. 11.)

145. Paragraph 18 of the second denial resolution provides "metes and bounds descriptions shall be provided for all easements." Knight acknowledged that this item could be a condition of final approval and included on the plans when they are finally approved and recorded and that said condition did not have a negative effect on the health, safety or welfare of the municipality or residents if done in that fashion. (See Knight, N.T. Volume III, p. 58, l. 13 through p. 59, l. 14.)

146. Paragraph 20 of the second denial resolution provides "applicant must submit a general proposal for maintenance of open space and the method of management." Knight acknowledged that Note 22 of the revised Phase I subdivision plan which provides "open space, including storm water management facilities shall be owned, maintained, and managed by the Home Owner's Association" takes care of that issue. (See Knight, N.T. Volume III, p. 60, ll. 4-25.)

147. Paragraph 21 of the second denial resolution provides "proposed street names must be submitted for approval by the Board of Supervisors." Knight acknowledged that note 21(d) of the revised Phase I subdivision plan submitted in November 1997 states: "Street names shall be submitted to the Buckingham police department and the board of supervisors for approval." Knight acknowledged that this could be done before final approval and as a condition of final approval. (See Knight, N.T. Volume III, p. 61, ll. 5-23.)

148. Paragraph 22 of the second denial resolution provides: "Development streets must be laid out to connect to adjacent development sites." Knight acknowledged that the only adjacent development site is the Buckingham Forest Property and that on page 3 of Exhibit P-19, the revised Phase I subdivision plan, the issue is addressed by providing a proposed 50 foot easement for future road connection. (See Knight, N.T. Volume III, p. 61, l. 24 through p. 63, l. 20.)

149. Paragraph 23 of the second denial resolution states: "Road A must be revised to meet all ordinance requirements for a major collector road." Knight acknowledged that the township manager's letter dated November 11, 1996, and marked as plaintiffs' Exhibit P-15, sets forth the Board's agreement that the main road identified as Road A shall have a cartway width of 32 feet and not 36 feet as required by the ordinance. (See Knight, N.T. Volume III, p. 63, l. 20 through p. 65, l. 22.)

150. Knight admitted that the MPC requires a specific identification as to what the deficiency is that is being claimed.

> Q. The Municipal Planning Code as you well know requires a specific identification as to what the deficiency is; doesn't it?
>
> A. Yes, it does.

Knight, N.T. Volume III, p. 67, ll. 4-7.

151. Paragraph 25 of the second denial resolution provides: "A portion of proposed Section A is located on land

owned by Buckingham Township. This must be corrected." Knight acknowledged that minutes of the May 1, 1996 planning commission meeting wherein Mr. Stein indicated that the Lindquists would need an easement from the adjoining property in order to align the entrance with the road and Mr. Knight said the Board is willing to obtain the easement. Knight acknowledged that the Township is the owner of the property east of the Lindquists' property and it had the ability to grant the easement that is referred to in paragraph 25.

Q. Now number 25, which I believe is the next item. "A portion of proposed Section A is located on land owned by Buckingham Township. This must be corrected." Did I read that accurately?

A. Yes, you did.

Q. You have Exhibit 11 in front of you. The Planning Commission minutes of May 1, 1996. I call your attention to items 28, 29, 30 treated on page 9, I'll read it. "Roadways. Mr. Stein said they will need an easement from the adjoining property in order to align the entrance with Mill Road. Mr. Knight said the board is willing to obtain this easement. The commission was in favor of 22 foot cartways." Did I read that accurately?

A. Yes, you did.

Q. The township is the owner of the property next to the--to the north I guess, or to the east of the Lindquist property on which Road A was partially shown on these plans; isn't it?

A. Yes, it is.

Q. The township has the ability to grant the easement that you referred to; correct?

A. That is correct.

Knight, N.T. Volume III, p. 67, l. 19 through p. 68, l. 19.

152. Paragraph 26 provides: "Several of the proposed cul-de-sacs do not meet the minimum requirement of 250 feet and must be corrected." Knight acknowledged that the Lindquists had made a waiver request of the cul-de-sac length and that the solicitor's memo to the Board of Supervisors in addressing the requested waivers provides: "Similarly, we won't be dealing with the length of streets ending in a cul-de-sac if they are private." (See Knight, N.T. Volume III, p. 68, l. 20 through p. 73, l. 11.)

153. Paragraph 27 of the second denial resolution provides: "The return radius of all cul-de-sacs shall be the same as the outer paving radius of the cul-de-sacs. This requirement has not been met." This comment no longer applied because of the Lindquist request for a waiver and the township's permission to allow the cul-de-sacs to be private. (See Knight, N.T. Volume III, p. 75, l. 20 through p. 76, l. 12; Waiver Request, Exhibit P-13; Bush Memorandum, Exhibit P-14.)

154. Paragraph 31 of the second denial resolution provides: "Since Road A is a major collector road, intersecting streets must be at least 800 feet apart." Knight acknowledged

that at the May 1, 1996 planning commission meeting there was listed a waiver request for cul-de-sac intervals and that the commission agreed. (See Knight, N.T. Volume III, p. 78, l. 5 through p. 79, l. 14; exhibit P-11.)

155. Paragraph 32 of the second denial resolution states: "The radii for all curb returns must be shown on the plans." Knight acknowledged that the radii returns are shown on page 2, 3, 4 and 5 of the record plan marked as Exhibit P-19. (See Knight, N.T. Volume III, p. 80, ll. 6-25.)

156. Paragraph 34 of the second denial resolution states: "Site lines must be shown on landscape plans. Adequate site distance must be provided at each intersection." Knight acknowledged that clear sight triangles are shown on pages 14 to 18 of the revised Phase I subdivision plans. Knight further acknowledged that calculations for the sight distance could be added. (See Knight, N.T. Volume III, p. 81, l. 8 through p. 82, l. 6.)

157. Paragraph 35 of the second denial resolution provides: "All typical roadway cross-sections, with swales shall be revised to conform with Appendix 5 of the Subdivision Land Development Ordinance. This includes pavement, cross-slope match, 15 foot wide parabolic swales and swales side slopes." Knight acknowledged that page 33 of the revised Phase I subdivision plan shows a typical roadway cross-section with swales.

> Q. Go to 35. "All typical roadway cross-sections with swales shall be revised to conform with Appendix 5 of the Subdivision Land Development Ordinance." This includes pavement, cross-slope

> match, 15 foot wide parabolic swale and swale side slopes.' Did I read that accurately?
>
> A. Yes.

Knight, N.T. Volume III, p. 82, l. 23 through p. 83, l. 5.

158. Paragraph 37 of the second denial resolution states: "Street lights must be shown and installed pursuant to a particular section." Knight acknowledges that there was an agreement with the Planning Commission as to limiting the number of street lights. (See Knight, N.T. Volume III, p. 83, l. 23 through p. 84, l. 18.)

159. Knight acknowledged that Note 37 on the revised Phase I subdivision plan provides: "Street lights shall be provided at Road A; York Road intersection, Road A, Road D, intersection and Road A, Road B intersection."

> Q. Now note 37 says: "Street lights shall be provided at Road A; York Road intersection, Road A, Road D, intersection and Road A, Road B intersection." Did I read that correctly?
>
> A. I presume you did.

160. Knight acknowledged that there are symbols on the plan which show where street lights are to be located. Knight further acknowledged that the second denial resolution does not specify which intersections should have lights and did not. (See Knight, N.T. Volume III, p. 84, l. 24 through p. 85, l. 15.)

161. Paragraph 42 of the second denial resolution states: "Sidewalks and curbs must be provided along all existing and proposed street." Knight acknowledges that at the May 1, 1996 Planning Commission meeting "the consensus was no sidewalks." (See Knight, N.T. Volume III, p. 85, l. 16 through p. 86, l. 6.)

162. Knight admitted that Township staff believed that there should be no parking, curbs, or sidewalks on the through streets. (See Knight, N.T. Volume III, p. 86, l. 7 through p. 82, l. 2; exhibit P-14.)

163. Paragraph 46 of the second denial resolution provides: "A fence or suitable vegetation is required around all detention facilities." Knight acknowledged that Note 31 on the revised Phase I subdivision plan states: "Fencing will be provided at all detention basin facilities." Knight acknowledged that if a condition of approval of the preliminary plan was that fencing had to be put on the final plan, there would be no detriment to health, safety and welfare. (See Knight, N.T. Volume III, p. 87, l. 8 through p. 88, l. 10).

164. Paragraph 48 of the second denial resolution provides: "The plans must be revised to address the requirements of the Township Tree Protection Ordinance. S.R. 9.21K." Note 21E on the revised Phase I subdivision plan addressed this comment.

> Tree protection fencing shall be provided between trees to be preserved in construction areas.
>
> Exhibit P.23.

165. Paragraph 51 of the second denial resolution provides: "All plans must clearly state that open space may not be separately sold nor shall such land be further developed or subdivided." Knight acknowledged that Note 17 on the revised Phase I subdivision plan similarly provided: "Open space land may not be separately sold, nor such land further developed or subdivided." (See Knight, N.T. Volume III, p. 88, ll. 11-23.)

166. Paragraph 52 of the second denial resolution provides: "The plans do not categorize the type of open space to be provided, i.e. lawn, natural, recreation, agricultural." Knight acknowledged that on page 2 of the revised Phase I subdivision plan "Open Space A" is identified as agricultural/natural," "Open Space B" is described as "lawn/natural." (See Knight, N.T. Volume III, p. 88, l. 24 through p. 89, l. 21; Revised Phase I Subdivision Plan, Exhibit P-19.)

168. Paragraph 57 of the second denial resolution states: "Since the site is located within the Neshaminy Creek Watershed Stormwater Management Plan Area, runoff from the entire site must be reduced to 75 percent of the predevelopment run-off." Knight acknowledged that this comment was a comment prepared in connection with the original set of plans and came out of his original reviews. (See Knight, N.T. Volume III, p. 91, l. 11 through p. 92, l. 8.)

169. Page 9 of the revised Phase I subdivision plan which is the first of five pages of the grading and utility plan shows a detention basin in the lower right hand corner adjacent to Road A and a detention basin exactly in the middle of "open

space" of the farm, which detention basins were not included in the original 1995 plan.

MR. KAPLIN: I'm going back to P-19.

Q. I would like to show you Sheet 9 of 34, P-19. This is the first of five sheets of the grading and utility plan. Are you familiar with this plan?

A. Yes.

Q. This plan shows a detention basin in the lower right hand corner adjacent to Road A; doesn't it?

A. Yes, it does.

Q. Shows a detention basin exactly in the middle of "open space" of the farm; doesn't it?

A. Yes, sir.

Q. Those detention basins were not included on the 1995 plan, right?

A. Correct.

Knight, N.T. Volume III, p. 92, l. 11 through p. 93, l. 2.

170. The detention basins, although not required under any township ordinance, were added in the revised phase I subdivision plans in response to Knight's comments prepared in connection with his reviews of the original plans. (See Wolf, N.T. Volume IV, p. 57, l. 15 through p. 58, l. 9.)

171. Paragraph 55 of the second denial resolution states: "Since the entire property is located in the carbonate geology

area, the plans must show compliance with Township Ordinance 94-06 with particular regard to depressions, wastewater disposal systems, regrading, detention basins and surface drainage channels." Knight acknowledged that this comment was made in connection with the original Phase I subdivision plan submitted in 1996.

> Q. Mr. Knight, Number 55 of Resolution 1598 says: 'Since the entire property is located in the carbonate geology area, the plans must show compliance with Township Ordinance 94-06 with particular regard to depressions, wastewater disposal systems, regrading, detention basins and surface drainage channels; right?
>
> A. Yes.
>
> Q. Now that is a comment again that you wrote with regard to the 1995 plans that were submitted in 1996; correct?
>
> A. I don't know. I presume it was, but I couldn't say that without looking at the review letter."

172. Knight acknowledged that the Lindquists provided a carbonate geology response letter. (See Knight, N.T. Volume III, p. 96, l. 11 through p. 98, l. 12.)

173. The township consultants, planning commission and the Lindquist team further agreed that between preliminary and final approvals borings would be completed to satisfy items 3 and 5 on pages 10 and 11 of Knight's January 2, 1998 review because it was impossible or impractical to de

termine what type of steps have to be taken in carbonate geology until after the plans have been finalized.

> The purpose of this letter is to set forth what the Lindquist Farm subdivision team believes to be the result of the three meetings we have had with the Buckingham Township Planning Commission, Lynn Froehlich and Ernie Knight on January 7th, 1998, January 22, 1998 and February 12, 1998. The following list of issues contains issues raised by the Township consultants and the Planning Commission and Lindquist team that have been agreed upon. Issues which the Planning Commission has determined need further consideration and issues that are unresolved.
>
> Carbonate Testing. We have agreed that between preliminary approval and final approval borings will be completed to satisfy Items Number 3 and 5 on pages 10 and 11 of Ernie Knight's January 2nd review."

Exhibit 43.

174. Paragraph 38 of the Resolution provides: "The grade of all driveways must meet subdivision regulations." Knight acknowledged that a waiver request was made of the Planning Commission from this requirement. (See Knight, N.T. volume III, p. 101, l. 15 through p. 105, l. 4.)

175. Knight acknowledged that in his review letter of the revised Phase I subdivision plan he indicated that he would reserve comment on the waiver request until he saw a list of

all driveways and/or proposed slopes. (Knight, N.T. Volume III, p. 107, l. 10 through p. 108, l. 11.)

176. Thomas Grant Kelso ("Kelso"), a planner with the firm of Castle Valley Consultants, worked for the Township in connection with the Lindquist proposed subdivision plans. (See Kelso, N.T. Volume IV, p. 8, 16, 1999.)

177. Kelso is not a licensed professional engineer. (See Kelso, N.T. Volume IV, p. 9, ll. 4-6.)

178. Kelso testified that Paragraphs 10, 49 and 50 in the first and second denial resolutions related to him. (See Kelso, N.T. Volume IV, p. 10, ll. 16- 24; Exhibit P-18 and Exhibit P-23.)

179. Kelso acknowledged that Paragraph 50 in the first and second denial resolutions did not apply to the revised Phase I subdivision plan because it was taken care of with a note on the plan.

> Q. All right. Now referring to the second, Resolution 1598. How many, if any of those three were still viable, pertinent to the plan that came into the Township in November 1997?
>
> A. Both items, No. 10 and 49, were still pertinent. Item 50, I believe, was taken care of with the note on the plan. It referred to the property being served by public water and sewer. And I think that was agreed upon, understood, and it was covered in the plan. So I don't believe that item was pertinent, but

the other two still were.

Kelso, N.T. Volume IV, p. 10, l. 25 through p. 11, l. 10.

180. Paragraph 10 of the second denial resolution provides: "Plans must be submitted for the design and location of all sanitary facilities including spray irrigation and lagoon areas. S.R. 5.3.F." (See Second Denial Resolution, Exhibit P-23). Kelso, N.T. Volume IV, p. 10, l. 25 through p. 11, l. 10.)

181. Paragraph 49 of the Second Denial Resolution provides: "The plans must be revised to show all required water distribution facilities and mains. S.R. 5.3.F.2." (See Second Denial Resolution, Exhibit P-23.)

182. Kelso admitted that Paragraphs 10 and 49 in the first and second denial resolutions are identical.

> Q. Now if you compare resolution P-18--I'm sorry, Exhibit P-18, which is resolution 1533, and Resolution 1598 with regard to the two items that you've testified about, 10 and 49, I believe they're identical, aren't they?
>
> A. I believe you're correct." Kelso, N.T. Volume IV, p. 29, l. 16-21.

183. Kelso admitted that there was a substantial amount of detail added to the original Phase I subdivision plan as revised in August 1997 and submitted in November 1997.

> Q. Okay. It's also your testimony today that when P--Exhibit P-19, the August 1997 plans, were submitted, there was a substantial amount of addi

tional items added to the plans first with regard to demonstrate water rights. That's what you said took care of a lot of the--I'm sorry, I interrupted you.

A. A lot of the details.

Q. A lot of the details.

A. Of the collection conveyance systems.

Q. And with regard to the sanitary sewer system, there was an 11- million gallon or 10-million gallon lagoon added to this plan, wasn't there, a storage lagoon?

A. I believe there was.

Q. Well, let's--if you would take a look with me, I believe it's on page 10 of these drawings, Mr. Kelso.

A. That's correct.

Q. If we can show His Honor these set of drawings, this large lagoon was added, was it not?

A. Yes, it was.

Q. And that was at your direction, was it not?

A. We need--our direction was what we needed.

Kelso, N.T. Volume IV, p. 30, l. 7 through p. 31, l. 5.

184. The revised Phase I subdivision plan submitted in November of 1997 took care of a lot of the details that were covered in Kelso's review of the original Phase I subdivision plan. The revised Phase I subdivision plan showed additional facilities in terms of wastewater and new location for wastewater facilities.

> Q. Now, did the November plans have anything new as far as water and sewer is concerned versus the plans that were originally rejected--actually, they were rejected in June of '97 and then the November plans were November of '97. Did they show something different or new?
>
> A. Yes, they did. They took care of a lot of the details that we had covered in our earlier review of the original set of plans. They showed some additional facilities in terms of the wastewater, and they showed a new location of the wastewater facilities. So there were differences.
>
> Q. Were those differences directed primarily to the on-site distribution of the water?
>
> A. The majority of them were. The majority of them pertained to the actual sewer and water lines within the development themselves.

Kelso, N.T. Volume IV, p. 11, l. 20 through p. 12, l. 11.

185. Between the time that the first denial Resolution was promulgated and the time the second denial Resolution was

promulgated, Kelso prepared a review of the first revised subdivision plan.

> Q. I will. Between the time that Resolution 1533 was promulgated and the time that Resolution 1598 was promulgated you prepared your review of the 1997 plans, right?
>
> A. That's correct.
>
> Q. And that's T-12?
>
> A. Correct.

Kelso, N.T. volume IV, p. 31, ll. 18-24.

186. Notwithstanding Kelso's review of the 1997 plans, the second denial resolution does not spell out any of the reported deficiencies that are listed in Kelso's review of the revised Phase I subdivision plans.

> Q. And that has, as Mr. Bush took you through it, talks about a number of specific deficiencies in the 1997 plans, doesn't it?
>
> A. That's true.
>
> Q. P--Resolution 1598 does not spell out the deficiencies that are listed in your letter, does it?
>
> A. No, it does not. Doesn't detail them.

Kelso, N.T. Volume IV, p. 31, l. 25 through p. 32, l. 7.

187. When the Lindquists submitted the original Phase I subdivision plan, they were directed to provide a "stand-alone" wastewater treatment system.

> Q. Okay. Thank you. Now I'd like--since Mr. Bush saw fit to go into the history, I'd like his honor to understand a little bit more of the details.
>
> When we submitted the plans, the 1995 plans, it's correct, isn't it, that we were told--the Lindquist development team--that we would have to prove that the Lindquist development of some 210 or 220 units would have to provide for its own stand-alone wastewater treatment system and its own stand-alone stormwater--or water system. Weren't we told that?
>
> A. That's correct.

188. The Lindquist team engaged Del-Val Soils and Environmental Consultants and its subcontractors to investigate the ability to have a stand-alone wastewater system on the Lindquist property and provided for a stand-alone system on the Lindquist property. (See Kelso, N.T. Volume IV, p. 32, l. 20 through p. 33, l. 16.)

189. The requirements imposed upon the Lindquists that they provide a self-sufficient wastewater treatment system are not written anywhere.

> Q. And it's true that when we were involved with this original plan, the 1995 plan, we were told

about this self-sufficiency requirement that's not written anywhere, right?

A. That's true.

Kelso, N.T. Volume IV, p. 33, l. 23 through p. 34, l. 2.

190. Bush admitted that the December 12, 1997 Court Order provided that the Board would permit the Lindquists to submit revised Plans for phase I immediately after the Stipulation was approved by the Court. (See Bush, N.T. Volume II, p. 84, ll. 2-10.)

191. Bush admitted that the revised plans dated August 8, 1997 and submitted in November 1997 were the revised plans for Phase I referred to in the December 12, 1997 Court order. (See Bush, N.T. Volume II, p. 84, ll. 11-14; Exhibit P-19.)

192. Despite the December 12, 1997 Order, the Township and its planning consultant, Bush, processed the Phase I revised subdivision plan as a new plan.

THE WITNESS: Well, the first plan had been rejected and--by resolution 1533. It's a continuation in the sense that it is the same property and the same applicants and the same engineers, but the township, I guess the administration did give it a new number and accepted it as a new plan.

Bush, N.T. Volume II, p. 10, l. 6 through p. 11, l. 12.

193. Bush admitted that the December 12, 1997 Court Order permitted the Lindquists to submit further revised plans

to address the comments raised by the township consultants in their respective reviews of the revised plans for phase I and II. (See Bush, N.T. Volume II, p. 84, l. 21 through p. 85, l. 5 and p. 85, ll. 8-21.)

194. Notwithstanding the December 12, 1997 Court Order, the Board processed the further reviewed plans as a new plan submission under ordinances in effect as of July 31, 1998 rather than December 13, 1995 as provided in the December 12, 1997 Order. (See Wolf, N.T. Volume I, p. 85, ll. 10-14 and p. 101, l. 12 through p. 102, l. 7.)

195. Knight acknowledged that paragraph 4 of the December 12, 1997 Court Order permitted the Lindquists to submit revised plans for phase I immediately after the stipulation was approved by the Court.

> A. Paragraph Number 4 permits the Lindquists to submit revised plans for Phase One immediately after the stipulation is approved by the Court.

196. Knight admitted that on November 18, 1997, revised plans were submitted as provided in the stipulation and in fact submitted prior to the Court Order dated December 12, 1997. (See Knight, N.T. Volume III, p. 111, l. 2 through p. 112, l. 1.)

197. Knight admitted that contrary to the terms of the December 12, 1997 Court Order, the Township considered the revised phase I subdivision plan as a "new submission."

> Q. They're revised plans aren't they, the plans submitted?

THE COURT: Hold it. That is my question.

Weren't the November '97 plans a revision of the '96 plans submitted?

THE WITNESS: I believe, Your Honor, that the township considered them as a new submission....

BY MR. KAPLIN:

Q. And the revised plans are the plans that were submitted on November 18, 1997; aren't they?

A. We were given those plans to review as a new submission by the township.

Knight, N.T. Volume III, p. 73, l. 23 through p. 75, l. 6.

198. Knight acknowledged that the plans that were submitted on July 31, 1998 were further revised plans.

Q. Based on this stipulation, Lindquist had the right to submit revised plans, re-revised plans, further revised plans, right?

A. That is correct.

Q. Paragraph 7, the Board will process and review the revised plans for Phase One and any revisions thereto in accordance with the zoning ordinance and SALDO as they existed on December 13, 1995, correct?

A. That is correct.

Q. Now when we submitted revised plans in the summer of 1998, July 31, 1998, right?

A. Yes.

Q. We submitted further revised plans on that date; didn't we?

A. Yes, you did.

Knight, N.T. Volume III, p. 112, ll. 10-25.

199. Knight acknowledged that he reviewed the further revised plans, but this review was not in accordance with the ordinances that were in effect on December 13, 1995 but were in accordance with the ordinances that were in effect on December 31, 1997. (See Knight, N.T. Volume III, p. 113, ll. 1-9.)

200. The Board directed Knight to review the further revised plans in accordance with current ordinances and not the December 13, 1995 ordinance.

Q. That violated the stipulation didn't it, Mr. Knight?

A. We were directed to review the plan in conjunction with the current ordinance.

Q. Who?

A. We--my firm was directed--

Q. You were?

A. Yes.

Q. By whom?

A. By the Board of Supervisors.

Knight, N.T. Volume III, p. 113, ll. 10-19.

201. The further revised plans were never reviewed by the Planning Commission nor the Bucks County Planning Commission.

Q. The plans were never reviewed by the Planning Commission?

A. I believe you're correct.

Q. The plans were never reviewed by the Bucks County Planning Commission?

A. Not that I'm aware of.

Knight, N.T. Volume III, p. 115, ll. 19-24.

202. The further revised plans on August 26, 1998, which was the same day that the Board rejected the plan. (See Knight, N.T. Volume III, p. 115, ll. 10-16.)

203. Knight acknowledged that since his review was issued on August 26, 1998 and the further revised plans were rejected on August 26, 1998, it would have been impossible for the Lindquists or its engineer to communicate a response or attempt to address the comments contained in his August 26, 1998 review letter.

Q. Not only that, but since your review was issued on the 26th and were rejected on the 26th, it would have been impossible for my client or its engineer

> to communicate and respond and attempt to address those comments, would it?
>
> A. You're correct.

Knight, N.T. Volume, III, p. 115, l. 25 through p. 116, l. 5.

III. DISCUSSION

As pertains to this case, 53 Pa.S.A.§10508(3) provides:

> Failure of the governing...to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms presented.....

Its Plaintiffs' contention that the Board of Supervisors did not act in time to reject their revised Phase I application, which had been submitted on November 18, 1997. they argue persuasively that Resolution No. 1598, enacted by the Board of Supervisors at their meeting on July 22, 1998 did not address the aforesaid revised Phase I plan, but rather addressed the original Phase I plan. In support of that argument, they point out that (a) there is no reference in No. 1598 to the *revised* Phase I plan; (b) the sixty (60) reasons for rejection set forth in No. 1598 are identical to the sixty reasons set forth in Resolution 1533 when the Board of Supervisors rejected the original Phase I plan on June 25, 1997; (c) P-19, the *revised* Phase I plan, addressed those sixty (60) reasons and P-19 has substantial differences from the original Phase I plan; and (d) their attached consultants' letters refer to the original Phase I plan, e.g., their planner's letter is dated April 29, 1996, and their engineer's letter bears the date May 14,

1996 which are eighteen and a half and eighteen months prior to the submission date of November 19, 1997 for the *revised* Phase I plan.

They also point out that the then Township manager, Deborah H. Rendon, acknowledged in her deposition of October 7, 1998 that the Township "Blew it". (N.T., p. 62, II. 10-15). In addition, they point out that the Board of Supervisors, in recognizing their mistake, enacted Resolution No. 1599 on August 12, 1998, readopting No. 1598 but with the additional wording that they were denying the "Revised Phase I Plan". And that then fourteen (14) days later the Board of Supervisors adopted Resolution No. 1600, again denying the *revised* Phase I plan, and further providing that Plaintiffs' submission of July 31, 1998 be treated as a *new* plan subject to the current ordinances and for which the Township wanted an additional fee of $9,300.00.

Plaintiffs further argue that these matters should be considered in light of the Township's stated goal to preserve the Lindquist property. (See Paragraph 3 of Township's Answer to Plaintiffs' Petition for Contempt.) (See also Paragraph 26 of the same Answer wherein the Township states it would like to preserve the Lindquist farm in the same manner as Yerkes Nonesuch and the Coles farms were preserved). They argue in addition that is should not be forgotten that the Board of Supervisors amended the zoning ordinance on June 11, 1997 eliminating cluster subdivision using TDRs as a "by-right" use in the AG-1 zoning district and required all new cluster division submissions to be treated as conditional uses. They also note that the Board of Supervisor's on Feb

ruary 26, 1997 amended the zoning ordinance to prohibit "cul-de-sac" streets anywhere in the Township.

It is further argued that the Township has acted in this case not only in violation of the Order of December 12, 1997 of the Bucks County Court, but also in violation of its own ordinances requiring review of subdivision applications. We agree with Plaintiffs on all of the above arguments and therefore, we concluded the Township's rejection was not timely as required by §508 of M.P.C.

As a back-up position, Plaintiffs argue that if , for some reason, it is concluded that the Township acted within the required time constraints, that its resolutions lacked the required references of §10508(2) of the Municipalities Planning Code in not: (a) specifying the defects found in the revised application; (b) describing the requirements which have not been met, and (c) citing the provisions of the statute or ordinance relied upon. Again, we agree with Plaintiffs' arguments. No. 1598 lists the same sixty (60) reasons form No. 1533, which dealt with the original Phase I submission. However, P-19 the *revised* Phase I plan, is substantially different from the original submission and many of the aforesaid sixty (60) reasons are no longer at issue. Therefore, the Township has also violated §10508(2) of the M.P.C. by failing to address the new criteria of P-19.

III. CONCLUSIONS OF LAW

1. An action in mandamus is appropriate to obtain recognition of the right to "deemed" subdivision approval where the governing body's denial of a subdivision applica

tion fails to comply with the requirements of section 508 of the Municipalities Planning Code ("MPC").

2. The court may enter peremptory judgment at any time after the filing of the mandamus complaint if the right of plaintiff is clear. *See* Pa.R.C.P. 1098; *Thayer v. Lincoln Borough*, 687 A.2d 1195 (Pa.Commw.1997).

3. "Section 508 requires that deemed approval be granted where no timely written decision is communicated to the applicant *or where a decision denying approval does not include citation to the specific ordinance provisions relied upon. We think mandamus is an appropriate remedy in either instance* since the applicant in both cases is *not* seeking review of the substance of the decision. Instead the applicant is seeking a determination that the municipality has failed to comply with the notice requirements of section 508."(Emphasis added) *Croft v. Board of Supervisors of Middletown Township*, 464 A.2d 623 (Pa.Commw.1983).

4. Section 508 requires that a governing body render and communicate its decisions on an application for subdivision approval within the time limits specified in the MPC. In this case, the review period for the Revised Phase I Subdivision Plan expired on July 31, 1998, and although an offer to extend the review period was made by the Lindquists, the offer was rejected. Therefore, the Board was required to take action on the Revised Phase I Subdivision Plan by July 31, 1998.

5. The only action taken by the Township's Board of Supervisors prior to July 31, 1998 was adoption of the Reso-

lution 1598 (the "Second Denial Resolution") on July 22, 1998.

6. Resolution 1598 did not relate to the Revised Phase I Subdivision Plan; rather expressly stated that it addressed the subdivision plan "dated October 30, 1995 and revised with the filing of a single sheet site layout plan dated August 9, 1996." Therefore, no action was taken by the Board on the Revised Phase I Subdivision Plan by July 31, 1998.

7. When the Board adopted Resolution 1598, it denied the wrong plan. *See Rodier v. Township of Ridley,* 597 A.2d 279 (Pa. Commw. 1991), wherein "deemed approval" was sustained where township's mailing before notice deadline was undeliverable because of insufficient postage, and final notice mailing bore a postage meter date after deadline.

8. Resolution 1599 and Resolution 1600 adopted on August 12, 1998 and August 26, 1998 respectively, were out of time.

9. Accordingly, pursuant to Section 508(3), the Revised Phase I Subdivision Plan must be deemed approved.

10. Section 508(2) requires that a decision of the governing body rejecting a plan must: (a) specify the defects found in the application; (b) describe the requirements of the MPC or the local ordinance which have not been met; and (c) provide citations to the specific provisions of the statute or local ordinance relied upon.

11. The requirements of Section 508(2) of the MPC are mandatory and may not be waived by the Court.

12. "Section 10508(2) is quite clear, '... the decision *shall* specify the defects ... and shall cite the provisions of the statute or ordinance ruled upon.' (Emphasis added) Generally, words are construed to mean their common usage. 1 Pa.C.S. § 1903. By definition, 'shall' is mandatory. Accordingly, there is no latitude for overlooking the plain meaning of § 10508(2) to reach a more desired result." *Coretsky v. Board of Commissioners of Butler Township,* 519 A.2d 571 (Pa.Commw. 1987).

13. Where a written decision of the governing body fails to cite the specific provisions of the ordinance relied on for denying an application, the application for land development shall be "deemed approved."

14. Where a decision of the governing body fails to describe the specific defects in the plan and the requirements which were not met, the application for land subdivision approval shall be "deemed approved."

15. In this case, Resolution 1598 does not identify any defect in the Revised Phase I Subdivision Plan, does not describe any requirement or ordinance which has not been met in the Revised Phase I Subdivision Plan, and, does not cite to a provision of a statute or ordinance on which the Board purportedly relied in denying the Revised Phase I Subdivision Plan. The only reasons stated are alleged defects in the Original Phase I Subdivision Plan.

16. The Board's own consultants conceded that approximately one-half of the alleged defects listed in Resolution 1598 do not apply to the Revised Phase I Subdivision Plan.

17. The Board's own consultants acknowledged that the remainder of the alleged defects were either addressed in the Revised Phase I Subdivision Plan or were waived by the Board at the October 23, 1996 board meeting and in the December 12, 1997 Court Order.

18. The test for "deemed approval" is whether information as to the particular defects in the plan, the requirements which have not been met, and the specific sections of the statute or ordinance relied upon is contained within the "four corners" of the written decision itself. *Bensalem v. Blank*, 114 Pa. Commw. 493, 539 A.2d 948 (1988).

19. In this case, the Board made no attempt to identify which of the numerous objections set forth in the Second Denial Resolution related to the Revised Phase I Subdivision Plan until the date of the hearing on the Motion for Peremptory judgment.

20. Accordingly, Section 508(2) requires that the Revised Phase I Application and Revised Phase I Subdivision plan be deemed approved.

21. Notwithstanding that the Board rejected the wrong plan the Board offered the testimony of the township engineer, planning consultant and sewer consultant to purportedly show that the Revised Phase I Subdivision Plan does not comply with the provisions of the Township Zoning Ordinance and SALDO. Evidence as to the substance of the Board's decision is not relevant to an action for "deemed approved." *Croft v. Board of Supervisors of Middletown Township*, 76 Pa.Commw. 488, 464 A.2d 625, 627 (1983). *See Clepper Farms,Inc. v. Trimmer*, 66 Pa. Commw.

326, 443 A.2d 1385 (1982).

We therefore enter the following:

ORDER

And now, this day 19th day of January 2000, after hearings conducted before the undersigned in a bench trial upon Plaintiffs' mandamus action filed against the Township on September 3, 1998, which hearings took place on April 16, June 7, July 7 and August 16, 1999, and upon consideration of the respective parties' Requests for Findings of Fact, Conclusions of Law and memoranda, this Court Orders and Directs the following:

1. Plaintiffs' Revised Phase I Subdivision Plan submitted to the Township on November 18, 1997, pursuant to an Order of this Court of December 12, 1997, is "deemed approved" upon the failure of the Township to comply with 53 Pa.S.A. §10508 on or before July 31, 1998.

2. Judgment is entered against the Board of Supervisors of Buckingham Township and in favor of Plaintiffs in the mandamus action.

3. The Board of Supervisors of Buckingham Township shall approve forthwith the Revised Phase I Subdivision Plan filed by Plaintiffs on November 18, 1997.

In entering this Order, we recognize that "deemed approved" of this Revised Phase I Subdivision Plan is only a preliminary step in the application process and that further proceedings will be necessary under the Subdivision Ordinance and, therefore, we further Order and Direct that:

4. The Board of Supervisors of Buckingham Township shall act in good faith in the processing, review and adjudiction of all matters relating to the proposed development.

This Court retains jurisdiction over this matter to insure that all aspects of this order are complied with.

BY THE COURT,

_____

WARD F. CLARK, SENIOR JUDGE

No. 04-681

IN THE

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP AND THE BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HARRY G. MAHONEY, ESQ.
Counsel of Record
DEASEY, MAHONEY & BENDER, LTD.
1800 John F. Kennedy Blvd.
Suite 1300
Philadelphia, PA 19103-2978
(215) 587-9400
Attorney for Respondents

Wright Appellate Services, LLC 1219
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

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STATEMENT OF THE CASE

On March 10, 2000, James and Cora Lindquist filed their original Complaint in the United States District Court for the Eastern District of Pennsylvania against various parties, including Buckingham Township and its Board of Supervisors, invoking 42 U.S.C.§ 1983 and claiming a violation of their procedural and due process rights, civil conspiracy and a regulatory taking. The Lindquists filed an Amended Complaint on May 24, 2000. Thereafter, the Lindquists filed their first Motion for Leave to File a Second Amended Complaint on June 5, 2000 which was denied as moot on June 22, 2000. On March 13, 2001, Appellants filed a second Motion for Leave to File a Second Amended Complaint to add the Lindquist children and SKSM Associates as Plaintiffs. SKSM was a general partnership engaged by the Lindquists to provide services during the land development process. The District Court denied that Motion on March 30, 2001. Finally, on December 21, 2001, after discovery was closed and after the District Court had disposed of multiple motions for summary judgment, including the Township's, the Lindquists filed a third Motion to Amend the Amended Complaint to add a cause of action for alleged violation of their equal protection rights. The District Court denied that Motion on June 13, 2002. The Order closely followed a remand of the case from the Third Circuit after an appeal to that Court by another Defendant had been withdrawn.

In denying the Lindquists' third Motion to Amend, the District Court rejected the Lindquists' argument that they had been thwarted in their attempts to secure public docu-

ments relating to another subdivision and land development project in the Township known as "Yerkes". The Lindquists claimed that the Yerkes documents served as the basis for their equal protection claim, asserting that they would show that the Yerkes' development was treated differently than the Lindquists' development by the Township. In response, the Township established that, during a very extensive discovery period set by the District Court, counsel for another Defendant had requested the subdivision and land development records relating to the Yerkes' development. The Township Defendants complied with the request by producing voluminous records for review and copying. In the summer of 2001, counsel for Defendant George Bush, the Township's former solicitor, reviewed the documents in defense counsel's office and requested the first page of each of the meeting minutes relating to the Yerkes subdivision. An invitation was extended to the Lindquists' counsel to review the same records in defense counsel's office. Lindquists' counsel chose not to accept that invitation for reasons she has never disclosed. In addition, the records were always available for review at the Township Building because they were public records. Petitioners' counsel simply failed to avail herself of the opportunity to review the records at the Township building until after the discovery deadline had been completed.

The facts of this case are voluminous and complicated, but the salient facts are succinctly set forth in the District Court's Findings of Fact (Appendix, 51a). Following a non-jury trial in September 2002 and the post-trial submission of proposed Findings of Fact and Conclusions of Law by the parties, the District Court entered Judgment in favor of the Township

Defendants (Appendix, 72a) and against the Lindquists after making Findings of Fact and Conclusions of Law (Appendix, 51a). The United States Court of Appeals for the Third Circuit affirmed the District Court's Judgment.

REASONS FOR DENYING THE PETITION

The Lindquists' Petition is based upon the premise that there is a split of authority in the Circuit Courts as to the standard for establishing a violation of substantive due process in municipal land use decisions. By advancing that premise, Petitioners necessarily argue that the Supreme Court has not yet applied the "shocks the conscience" standard in such cases. Respondents respectfully suggest that the Petitioners are mistaken in this argument.

I. THE "SHOCKS THE CONSCIENCE" STANDARD HAS BEEN APPLIED BY THIS COURT TO A SUBSTANTIVE DUE PROCESS CASE INVOLVING MUNICIPAL LAND USE DECISIONS

A review of the analyses and decisions in *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389, 155 L. Ed.2d 349 (2003) demonstrates that the Court was not limiting its holding in *Lewis* to cases in which a law enforcement officer is accused of violating the substantive due process of a criminal suspect in a pursuit case. While a police chase was the factual background in that case for the Court's decision, and there was then a split of authority between several

Circuits on the standard involved in police pursuit cases ("deliberate indifference" or "reckless disregard" versus "shocks the conscience"), the Court apparently approached the case as an opportunity to re-articulate a standard which it had been using for over half a century in substantive due process cases involving executive action by government.

The core of the concept of due process is "protection against arbitrary action". *County of Sacramento v. Lewis*, 523 U.S. at 845. "Our cases dealing with abusive, executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' . . . ." *Id.*, at 846, citing *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261 (1992). The Court noted that "in *Collins v. Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials " ' "from abusing [their] power, or employing it as an instrument of oppression." ' " 503 U.S. at 126, 112 S.Ct. at 1069 (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 at 196, 109 S.Ct. 998, at 1003, 103 L. Ed. 2d 249 (1989) (in turn, quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670-671, 88 L. Ed. 2d 677 (1986))." *County of Sacramento v. Lewis*, 523 U.S. at 846. Turning to an analysis of what constitutes arbitrary action, the Court noted that it first described such action as conduct that " 'shocks the conscience' and violates the 'decencies of civilized conduct.' " *County of Sacramento v. Lewis*, 523 U.S. at 846, citing *Rochin v. California*, 342 U.S. 165, 172-173, 72 S.Ct. 205, 209-210, 96 L.Ed. 183 (1952) (forced pumping of suspect's stomach was enough to violate sub-

stantive due process). Referring again to *Collins v. Harker Heights*, 503 U.S. at 128, 112 S.Ct. at 1070, the Court stated that "we said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' " *County of Sacramento v. Lewis*, 523 U.S. at 847.

In addition to describing arbitrary executive action as only that conduct which "shocks the conscience", the Court also made clear its application of that standard to all substantive due process cases in which executive action is the basis for the due process claim by reference to an earlier decision:

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942).

County of Sacramento v. Lewis, 523 U.S. at 850. The exact analysis of the circumstances of each substantive due process cases demanded by the Court to determine if the government's action rises to the level of "arbitrary" or "conscience shocking" certainly opened the door for this standard to be

applied to substantive due process claims involving executive action in land use cases.

Indeed, in *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003), the Court applied its standard of arbitrary action (action so egregious that it "shocks the conscience") to a land use case in which a municipality's engineer refused to issue building permits and the municipality submitted its administrative land use determination to a referendum pursuant to its charter. In that case, plaintiff claimed that those two actions violated the plaintiff's substantive due process rights. This Court found no merit to the claim. Referring to the municipal engineer's refusal to issue building permits, the Court analyzed the substantive due process claim, referencing its earlier decision in *County of Sacramento v. Lewis*, *supra*, as follows:

> We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis* [citations omitted]. (noting that in our evaluations of "abusive executive action", we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' ").

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., *supra*, 538 U.S. at 198, 123 S.Ct. at 1396.

The Petitioners' analysis of *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., supra*, clearly misses the mark (Petition for Writ of Certiorari, p.26). Petitioners apparently argue that because the Court did not use the terminology "shocks the conscience", it was not applying its charactization of "arbitrary conduct" previously set forth in *County of Sacramento v. Lewis, supra* to the actions of the municipality in *City of Cuyahoga Falls,* a land use case. Petitioners' analysis is, at best, a misreading of those two decisions. Official government misconduct which rises to the level of a substantive due process violation is "arbitrary" in the constitutional sense and is the functional equivalent of conduct which is so egregious that it shocks the conscience.

II. WITH ONE EXCEPTION, THERE IS NO SPLIT OF AUTHORITY IN THE CIRCUIT COURTS AS TO THE STANDARD NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS IN LAND USE CASES

The Lindquists concede in their Petition that the First, Second, Third, Sixth, Eighth and Tenth Circuits follow the "shocks the conscience" standard set forth in *County of Sacramento v. Lewis, supra*, and adopted by the Third Circuit in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, et al., 316 F.3d 392 (3d Cir. 2003). Although Petitioners claim that the Fifth Circuit applies a rational basis test, they cite no case to support that contention. Respondents respectfully suggest that, with the possible exception of the Seventh

Circuit, Petitioners are mistaken in their analysis of where the remaining Circuits fall on this issue.

A.. District of Columbia Circuit

The Lindquists cite to the case of *George Washington University v. District of Columbia*, 318 F.3d 203 (2003) and claim that the District of Columbia Circuit employs a different standard than the Third Circuit. There, the District of Columbia Circuit described its standard in such substantive due process cases in a manner closely analogous to the "shocks the conscience" standard:

> Once a property interest is found, however, the doctrine of substantive due process constrains only egregious government misconduct. We have described the doctrine as preventing only "grave unfairness," *Silverman v. Barry*, 269 U.S.App. D.C. 327, 845 F.2d 1072, 1080 (D.C. Cir. 1988), and identified two ways in which such unfairness might be shown: "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under §1983." *Id. See also Tri-County Industries v. District of Columbia*, 322 U.S.App. D.C. 412, 104 F.3d 455, 459-60 (D.C. Cir. 1997); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 465-67 (7th Cir. 1988), (noting the "uncanalized discretion" inherent in substantive due process review and thus, given the otherwise resulting federal judicial intrusions on state and legislative authority, the need to limit its role to

> islative authority, the need to limit its role to extreme cases).

George Washington University v. District of Columbia, *supra* at 209.

Without using the words "shocks the conscience", the language of that case refers to egregious government misconduct which is one of the phrases used by the Supreme Court in *County of Sacramento v. Lewis*, *supra*, to describe "arbitrary" action which violates substantive due process. Therefore, Respondents respectfully suggest that Petitioners misread this case.

The later case of *Yates v. District of Columbia*, 324 F.3d 724 (D.C. Cir. 2003) clearly followed *County of Sacramento v. Lewis*, *supra* and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, *supra*. In *Yates*, the Plaintiff claimed a property interest in continued employment in a school district. The Circuit Court, questioning whether he actually had a property interest, stated:

> But even if he did, he suffered no deprivation of substantive due process. "[O]nly the most egregious official conduct" rises to the level of a substantive due process violation. [citing *County of Sacramento v. Lewis*, *supra*, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, *supra*; *Tri-County Industries, Inc. v. District of Columbia*, *supra*, *Silverman v. Barry*, *supra*].

Yates v. District of Columbia, *supra*, at 725, 726.

Besides following *Lewis* and *Cuyahoga Falls* in two "property" cases, the District of Columbia Circuit's decisions recognized that the Supreme Court intended the "shocks the conscience" standard to be applied in cases other than police pursuits.

B. Fourth Circuit

Petitioners cite *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (2002) for the proposition that the Fourth Circuit applies a rational basis test; i.e., if the actions of the government are not rationally related to a legitimate government purpose, those actions violate substantive due process. In that case, however, the Fourth Circuit, in addressing the plaintiff's substantive due process claim against the governmental defendants for failure to issue a building permit for a proposed asphalt plant, stated as follows:

> In order to validly state such a claim, [plaintiff] must demonstrate: "(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). See also, *Front Royal & Warren County Indust. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 287-88 (4th Cir. 1998). Substantive due process protections "run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapa-

> ble of avoidance by any pre-deprivation procedural protections or of adequate retification by any post-deprivation remedies. *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991).

Tri-County Paving, Inc. v. Ashe County, *supra*, at 440. While the Fourth Circuit does not use the terminology "shocks the conscience", it describes "arbitrary" conduct in terms of conduct "so far beyond the outer limits of legitimate governmental action", "irrational" and "so unjustified by any circumstance or government interest", that such a description borders upon, and may well equate to, the "egregious" conduct described by the Court in *County of Sacramento v. Lewis*, *supra*, which constitutes a violation of substantive due process.

C. Ninth Circuit

Petitioners cite to the case of *Squaw Valley Development Company v. Goldberg*, 375 F.3d 936 (9th Cir. 2004) and correctly point out that the Ninth Circuit held that the Fifth Amendment Takings Clause preempts substantive due process claims for deprivation of property. In doing so, however, the Ninth Circuit preliminarily addressed the law of substantive due process claims and quoted *County of Sacramento v. Lewis*, *supra*, for the proposition that "the touchstone of due process is protection of the individual against arbitrary action of government." *Squaw Valley Development Company v. Goldberg*, *supra* at 948 citing *County of Sacramento v. Lewis*, 523 U.S. at 845. It further stated, in its opinion, that "the substantive component of the Due Process Clause 'forbids the government from depriving a person of life, liberty,

or property in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." ' *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (quoting *United States v. Salerno*, 481 U.S. 739, 746, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987)); *Daniels v. Williams*, 474 U.S. 327, 331, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) (explaining that substantive due process protects against government power arbitrarily and oppressively exercised)." *Squaw Valley Development Company v. Goldberg*, *supra* at 948.

Thus, it is apparent that the Ninth Circuit follows the Supreme Court's substantive due process analysis as set forth in *County of Sacramento v. Lewis, supra.* That Circuit is different from the Third Circuit in its holding that the Fifth Amendment Takings Clause preempts substantive due process in cases alleging a deprivation of property rights. However, the Ninth Circuit applies the "shocks the conscience" standard to substantive due process cases involving executive action by government. Thus, there is no split of authority as to the standard applied.

D. Eleventh Circuit

Petitioners also cite *Greenbriar Village, L.L.C. v. City of Mountain Brook*, 345 F.3d 1258 (11th Cir. 2003) but not to support their argument of a split in authority on the standard to be applied in substantive due process cases. Rather, like the *Squaw Valley Development Corporation v. Goldberg* case, *supra*, Petitioners cite it only to demonstrate that the Eleventh Circuit holds that property rights created by state law are not "fundamental rights" created by the Constitution

and are thus not subject to due process protection. Therefore, as with the *Squaw Valley* case, this decision does not reflect a split from the Third Circuit's position on the standard to be applied in a substantive due process case.

E. Seventh Circuit

The only case the Petitioners have cited which possibly supports its position that there is a split among the Circuits is the Seventh Circuit case of *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988). Oddly enough, this case is cited by the District of Columbia Circuit in *George Washington University v. District of Columbia*, *supra*, which held that substantive due process constrains only egregious government misconduct. *Coniston* is the only case cited in which a Circuit Court clearly appears to follow a rational basis test in a substantive due process claim involving executive action in a land use case. However, it must be noted that *Coniston* pre-dates *County of Sacramento v. Lewis*, *supra*, by ten years and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, *supra*, by fifteen years. It is likely that the Seventh Circuit will, in an appropriate case, follow the Supreme Court and the other Circuits in applying the "shocks the conscience" standard to a substantive due process claim in a land use case. Under these circumstances, Respondents respectfully suggest that the Court's time and resources would not be well spent in granting certiorari.

III. PETITIONERS' MOTION TO AMEND PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 15(a) WAS PROPERLY DENIED BY THE DISTRICT COURT AND PROPERLY AFFIRMED BY THE THIRD CIRCUIT

A denial of a motion to amend is within the discretion of the District Court and is sound if justified by undue delay or prejudice. *Foman v. Davis*, 371 U.S. 178 (1962); see also *Lake v. Arnold*, 232 F.3d 360 (3d Cir. 2000). Although the Lindquists do not highlight the following facts in their Petition, their Motion to Amend the Complaint on December 21, 2001 was the fourth time they had sought to amend their Complaint but the first time they attempted to add an equal protection claim. At that point in the litigation, the discovery deadline set by the District Court had passed. In addition, despite the Lindquists' assertions to the contrary, all of the documents relating to the other development which the Lindquists claimed served as a basis for the equal protection claim, had always been available for their inspection. First, the documents relating to the other land development, Yerkes, were public records and available to any person for examination at the Township Building. Also, the Township's counsel, at the request of another party, had assembled these documents in counsel's office and invited all counsel, including Lindquists', to inspect the documents and to select documents for copying. Lindquists' counsel chose not to accept the invitation to inspect those records.

Finally, case dispositive motions had already been filed and decided by the District Court when the Lindquists sought

leave to amend their Complaint. Under those circumstances, the District Court appropriately determined that there was no legitimate explanation for the undue delay in seeking leave to amend the Complaint. The undue delay without explanation, coupled with the facts that discovery had been closed in the case and case dispositive motions had already been decided, was sufficient to establish prejudice to the Township if the Motion to Amend had been granted.

Under the circumstances, the District Court's denial of the Motion to Amend and the Third Circuit's affirmance of that decision were entirely appropriate and in no way conflict with the relevant decisions of this Court.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Harry G. Mahoney
Counsel of Record
Deasey, Mahoney & Bender, Ltd.
Suite 1300
1800 John F. Kennedy Boulevard
Philadelphia, Pa 19103-2978
(215) 587-9400
Counsel for Respondents, Buckingham Township and the Board of Supervisors of Buckingham Township

(3)

Supreme Court, U.S.
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No. 04-681

In The

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

THOMAS JON WARD
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

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INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Respondents. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 215,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development. Protecting our members' fundamental constitutional rights in property has long been an integral part of our activities.

NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowners in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. Cal.*

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Coastal Comm'n, 483 U.S. 825 (1987)[2]; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004); and *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

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2. The Court's opinion cited NAHB's brief. 483 U.S. at 840.

INTRODUCTION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. This Court has developed an interpretation of the Due Process Clause that protects one's basic substantive rights, in addition to procedural rights. "Substantive due process" guarantees that a state cannot deny a person's life, liberty or property without appropriate governmental justification, regardless of the government's procedures. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (explaining that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . ."); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (explaining that it is possible for a state to deprive property rights by unreasonable legislation); *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897) (recognizing that "liberty" means more than a person's right to be free from incarceration, but also to be free to "live and work where he will" and enter into proper contracts).

In the case below, the Petitioners claimed that Buckingham Township violated their right to substantive due process by abusing its zoning and planning authority and unlawfully conspiring to thwart their land development project. *Lindquist v. Buckingham Township*, 106 Fed. Appx. 768, 769 (3rd Cir. 2004). In analyzing the Petitioner's substantive due process claim, the Court of Appeals applied the "shocks the conscience test." *Id.* at 773. Applying such a heightened test to a land use setting contradicts the clear precedent of this Court and will erode the rights of all persons to use and enjoy their property without unwarranted interference.

ARGUMENT

I. The Court Below Has Focused Only On A Subset of This Court's Substantive Due Process Precedent.

A. Governmental Action That Restricts a Landowner's Right to Use Property Must be Rationally Related To a Legitimate Governmental Purpose.

This Court's early decisions dealing with restrictions of land use establish a substantive due process test that the Court has never renounced. In *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926), landowners facially challenged a zoning ordinance on the grounds that it violated the Due Process Clause of the Fourteenth Amendment. The ordinance in question established use, height and area districts in the Village. *Id.* at 380. In upholding the constitutionality of the ordinance, the Court explained that a land use regulation would be deemed unconstitutional where its provisions are "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare." *Id.* at 395. In addition, the Court provided that when provisions of the ordinance are applied to "particular premises . . . or to particular conditions . . . some of them, or even many of them may be found to be clearly arbitrary and unreasonable." *Id.*

Just two years later, the Court decided *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), in which a landowner brought a due process challenge to a zoning ordinance as applied to his 29,000 square foot parcel. In *Nectow*, the Court stated that "[t]he governmental power to interfere by

zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited . . . ." *Id.* at 188. Moreover, it found that by applying the ordinance in question to the landowner, the City violated the Fourteenth Amendment because the restriction did "not bear a substantial relation to the public health, safety, morals and general welfare." *Id.* at 187.

Since these early decisions, the Court has infrequently reviewed cases where a landowner has complained that a government body violated the Due Process Clause under its zoning and planning authority.[3] *See Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., explaining the history between the years 1928 and 1977). However, in the cases that the Court has reviewed, it has never suggested that the government's action must "shock the conscience" before a violation of the due process clause can lie. Rather, the Court has consistently applied a more traditional "arbitrary or capricious," "rational basis" means-end analysis. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("Where property interests are adversely affected by zoning, the courts have generally emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns . . ."); *Moore*, 431 U.S. at 500 (explaining that the ordinance at issue violated the due process clause because it had only a "tenuous relation" to the government's stated purpose); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962) (providing that to protect the public under its police power the governmental

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[3] In contrast, the Court's decisions analyzing property restrictions under the Takings clause have been more frequent. *See, e.g.*, cases cited *supra* at 1-2.

action must be reasonably necessary to accomplish its purpose).

In *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003), the Courts' most recent land restriction decision analyzed under the Due Process Clause, a landowner who desired to build a low income housing complex claimed that the City violated its substantive due process rights by i) subjecting its site plan approval to referendum, and ii) refusing to issue building permits after the City Council had approved the site plan. The Court did not look to see whether the City's actions shocked its conscience. Instead, it explained that there was no precedent to support the argument that subjecting the plan approval to referendum was "per se arbitrary governmental conduct" that would violate the due process clause. *Id.* at 199. Furthermore, the Court reviewed the denial of the building permits to determine whether the City's conduct was "egregious or arbitrary." *Id.* It found that the law director and engineer's refusal to issue the permits "rational" in light of a charter provision that made it unlawful to issue the permits. *Id.*

Though the Court has used a variety of terms to describe the proper test for determining whether a governmental land use restriction violates the due process clause, the Court has never overruled its decisions in *Euclid* and *Nectow*. Furthermore, the Court has never suggested that the lower courts should review such restrictions to determine whether they "shock the conscience."[4] By

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[4] In *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir. 2004), *cert. granted,* 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163), one issue presented is whether a land use restriction can be held invalid under the Takings Clause. Both the United States and the State of Hawaii argue that "substantially advance a legitimate

applying such a heightened level of review to a land use restriction case, the Third Circuit has disregarded this Court's precedent.

The Court should review this matter to reassert that governmental action that restricts a property owner's right to use property must be rationally related to a legitimate governmental purpose.

B. *County of Sacramento v. Lewis* Does Not Mandate Use of The "Shocks The Conscience" Test.

In the case below, the Third Circuit applied the "shocks the conscience" test by following its earlier decision in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003). *Lindquist*, 106 Fed. Appx. at 773. The *United Artist* panel relied on this Court's decision *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) when it explained that "executive action violates substantive due process *only* when it shocks the conscience . . . ." *United Artists*, 316 F.3d at 399-400 (emphasis added).

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state interest" is the proper test for a substantive due process violation. Brief For Petitioners at 23-28, *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163) (section discussing "The 'Substantially Advance' Test Is Actually The Test For A Substantive Due Process Violation"); Brief of Amicus Curiae The United States at 9, 22 n.10, 24-26, *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 314 (U.S. Oct. 12, 2004) (No. 04-163) ("the phrase 'substantially advance' has its roots in due process jurisprudence . . ."). Neither, the United States nor Hawaii suggests that the proper due process test in a land use matter is whether the government's actions shock the conscience.

The Third Circuit misinterpreted *County of Sacramento* and has improperly expanded that decision beyond the facts it addressed. In *County of Sacramento*, the Court clearly explained that the core concept of due process is "the protection against arbitrary action." *County of Sacramento*, 523 U.S. 845-46 (citing *Hurtado v. California*, 110 U.S. 516 (1884); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Daniels v. Williams*, 474 U.S. 327 (1986)). It then addressed it decisions that rely on the "shocks the conscience" test and explained that "the Due Process Clause is violated by executive action only when it 'can properly be characterized *as arbitrary, **or*** conscience shocking, in a constitutional sense.'" *County of Sacramento*, 523 U.S. at 847 (quoting *Collins v. Harker Heights*, 503 U.S. 115 (1992)) (emphasis added). By providing that the Due Process Clause is violated "only" when executive action shocks the conscience the Third Circuit has ignored the first, and traditional, standard by which the government can violate the Due Process clause: namely when its actions can be characterized as "arbitrary" or "irrational."

Moreover, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). In *County of Sacramento*, the Court stated the issue of the case as "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspected offender." *County of Sacramento*, 523 U.S. at 835. The Third Circuit, however, applied the test described in *County of Sacramento*, to the "more mundane world of land use decisions, where lifeless

property interests . . . are involved" and has thereby narrowed the substantive due process rights of property owners in that circuit. *United Artists*, 316 F.3d at 407 (Cowen, J., dissenting). If this Court believes that "shocks the conscience" is the correct test for a matter dealing with governmental abuse of the police power over land use decisions, it must say so explicitly. *See Shalala v. Illinois Council On Long Term Care, Inc.* 529 U.S. 1, 18 (2000) ("The Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

Finally, in *County of Sacramento*, the Court used the shocks the conscience test because it was "dealing with abusive *executive* action . . . ." *County of Sacramento*, 523 U.S. at 846 (emphasis added). In the case below, however, the Board of Supervisors denied the landowners plans by resolution. *Lindquist v. Buckingham Township*, No. Civ.A. 00-1301, 2003 WL 22757894, at *3-6 (E.D. Pa. Apr. 15, 2003). These types of actions are properly considered adjudicatory actions, not executive. *Thornbury Township Bd. of Supervisors v. W.D.D., Inc.*, 546 A.2d 744, 747 (Pa. Commw. Ct. 1998); *North Point Breeze Coalition v. City of Pittsburgh*, 431 A.2d 398, 401 (Pa. Commw. Ct. 1981). Thus, the Third Circuit has again misapplied *County of Sacramento* to a fact pattern to which it does not fit.

The Court should grant certiorari to correct the Third Circuit's incorrect interpretation of *County of Sacramento*.

II. The "Shocks The Conscience" Standard Confers State Governments Unwarranted Power to Restrict Property Rights.

In pre-Constitutional America, most states followed the English common law as the basis for their jurisprudence

and "the views of William Blackstone influenced American law long after the break with England." Ely, *supra*, at 32; *See Alden v. Maine*, 527 U.S. 706, 715 (1999) (explaining that Blackstone's "works constituted the preeminent authority on English law for the founding generation"). Blackstone wrote that individuals have certain "absolute" rights, which are rights that belong to individuals "merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." J.W. Ehrlich, *Ehrlich's Blackstone* 42 (Greenwood Press 1959). "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at 51.

The Colonial leaders of the United States believed that "the protection of private property was crucial to the preservation of freedom," and that "property rights antedated political liberty." James W. Ely, Jr., *The Guardian of Every Other Right, A Constitutional History of Property Rights* 28 (Oxford University Press 2d ed. 1998); *See generally* Bernard H. Siegan, *Property Rights* 50-52 (Transaction Publishers 2001). Thomas Jefferson, in fact, believed that property ownership was so fundamental to the creation of the United States that "he proposed in 1776 that the new state of Virginia grant fifty acres of land to every man that did not have that many." Gordon S. Wood, *The Radicalism of The American Revolution* 179 (1991). Because of the importance of property, the founding fathers understood that the function of government was to secure these rights. Ely, *supra*, at 32; *The Federalist No. 54*, at 278 (James Madison) (Bantam Classic ed., 1982) ("Government is instituted no less for protection of the property, than of the persons of individuals . . . . The rights

of property are committed into the same hands with the personal rights.").

Certainly, applying the amorphous "shocks the conscience" standard to matters dealing with governmental land use restrictions allows even "intentional and flagrant abuses of authority . . . to go unchecked." *United Artists*, 316 F.3d at 406-407 (Cowen, J., dissenting). In addition, such a demanding standard, will eventually lead to a further erosion of property rights. As governments take actions that restrict property rights more often, these actions are less likely to shock the conscience. In other words, actions that shock the conscience today will not shock the conscience 50 or 100 years from now. For example, a century ago it may have "shocked the conscience" to restrict land use by regulating the habitat of a fly or by deeming an upland drainage ditch a "navigable water." These types of regulations, however, are apparently not "conscience shocking" in today's heightened regulatory climate. *See, e.g., National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). It is hard to accept that the founding fathers anticipated or would have condoned the erosion of property rights that will surely follow from applying the "shocks the conscience" standard to matters dealing with governmental restrictions of land use.

Finally, in supporting its use of the shocks the conscience test, the Third Circuit explained that even when government knowingly or in bad faith enforces unlawful land use restrictions its conscience is not shocked and the Constitution is not violated. *See* 106 Fed. Appx. at 774. (citing *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992); *Baker v. Coxe*, 230 F.3d 470 (1st

Cir. 2000); *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999); and *PFZ Properties, Inc. v. Rodriquez*, 928 F.2d 28 (1st Cir. 1991)).

The foundation of our government is that governmental officials may not restrict any right for personal or arbitrary reasons. Over 100 year ago, the Court explained that the nature and the theory of the United States'

> institutions of government [and] the principles upon which they are supposed to rest . . . do not . . . leave room for the play and action of purely personal and arbitrary power . . . . [S]overeign powers are delegated to the agencies of government, sovereignty itself [however,] remains with the people . . . . And the law is the definition and limitation of power.

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Furthermore, the purpose of the Fourteenth Amendment's due process clause is "to protect the people from the State." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

Actions taken by a government official that he or she knows are illegal, or that are taken for personal reasons, destabilize the foundation of our institutions of government. And these are exactly the types of actions from which the people must be protected. *Cf. Daniels v. Williams* 474 U.S. 327, 333-34 (1986) (explaining that a deliberate decision not to comply with required procedures violates the Due Process Clause); *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir.1986) (if a government official refused to issue permits to a developer for reasons

that were in violation of state law, such refusals "would constitute a deprivation of property without due process").

The Court should review this matter to ensure that the peoples' rights to own and use property are not continuously eroded and to protect the people from any government that would knowingly take illegal actions.

CONCLUSION

The U.S. Constitution does not allow government to deprive a citizen of his property without due process of law. By applying the shocks the conscience standard to a land use restriction case, the Court of Appeals has ignored this Court's precedent and unconstitutionally narrowed each citizen's right to own and use property. NAHB respectfully requests that the Court grant certiorari.

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Respectfully submitted,

THOMAS JON WARD
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

BEST AVAILABLE COPY